TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 478.

FOK YOUNG YO, APPELLANT,

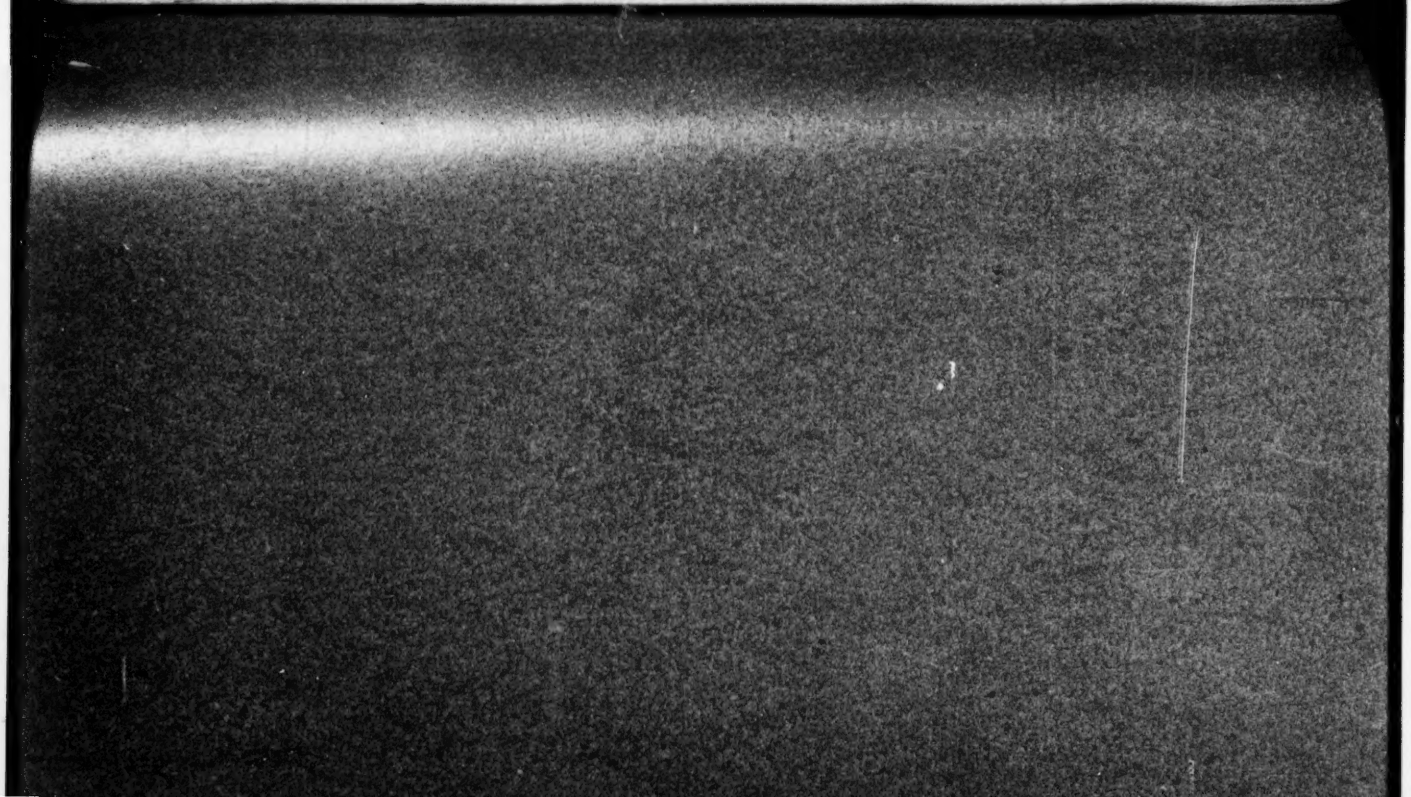
vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED NOVEMBER 26, 1901.

(18,331.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1901.

1 The United States Supreme Court.

UNITED STATES OF AMERICA, } ss:
Northern District of California, }

To the United States of America, intervenor, Greeting:

You are hereby cited and admonished to be and appear at the city of Washington, before the Supreme Court, on the 10th of December A. D. 1901, to do and receive what may appertain to justice, and pursuant to an appeal filed in the clerk's office of the district court of California, wherein Fok Young Yo is applicant, for a writ of *habeas corpus*, and you are intervenor opposing said application.

Witness the Honorable J. J. De Haven, district judge, this 2d day of November A. D. 1901, and of the Independence of the United States of America the one hundred and twenty-fifth.

JOHN J. DE HAVEN,
District Judge.

1½ [Endorsed:] 2. 12480. United States district court. In the matter of Fok Young Yo, on *habeas corpus*. Citation. Due service of the within citation acknowledged this 2nd day of November, 1901. Edward J. Banning ass't U. S. att'y. Geo. E. Morse clerk. By J. S. Manley deputy clerk. J. E. Foulds & Earll H. Webb, attorneys for petitioner.

2 (*Petition for Writ.*)

In the District Court of the United States, Northern District of California.

In the Matter of the Application of FOK YOUNG YO for a Writ of *Habeas Corpus*.

To the honorable the district court of the United States in and for the northern district of California:

Your petitioner, Fok Young Yo, respectfully represents and shows to this honorable court that he is a citizen of the Empire of China, and is a resident of Guatemala, Mexico, to which last-named place he was travelling when interrupted in his journey as hereinafter described.

That he is unlawfully and unjustly detained and imprisoned in a frame building on what is known as the Pacific Mail dock at the port of San Francisco, State of California, and is there held and detained by William H. Avery, agent for the Toyo Kisen Kaisha, by virtue of an order of deportation made by the collector of customs for the port of San Francisco, a copy of which is hereto attached and marked Exhibit "A."

Your petitioner further shows that on the 24th day of August,

1901, he purchased from the agent of the Toyo Kisen Kaisha at Hongkong, passage from said last-mentioned place to San Jose de Guatemala, in Mexico, paying therefor the sum of one hundred and eighty-three (Mexican) dollars ($183.00), and receiving a ticket from said agent for passage on the steamship "Nippon Maru" to the port of San Francisco, and an order upon the San Fran-
3 cisco agent of said company for a steerage ticket from San Francisco to San Jose de Guatemala, which ticket and order he now has in his possession.

That upon arriving in the port of San Francisco, your petitioner was, on September the 19th, 1901, examined by a customs inspector, his baggage and private papers opened, and his person searched.

That your petitioner is not making application to enter the United States, nor to pass in transit through the territory thereof, but is merely a passenger en route for a foreign port and touching at this port while on his journey along the usual course of travel, and for the purpose of transshipping to another vessel.

That after said examination of your petitioner, as above set forth, the collector of customs at this port thereupon made the order of deportation above referred to, and your petitioner is now confined in the manner above described, and will be deported and sent back to China, the country from whence he came, unless prevented by an order of this court.

Your petitioner further shows that his detention and imprisonment as aforesaid, is illegal in this, to wit:

1. That the order under which your petitioner is held is illegal and void and is not authorized by any law of the United States or by any treaty between the United States and the Empire of China.

2. That the collector of customs has no authority under the law to examine your petitioner or to confine him in the manner above described.

3. That your petitioner is neither an alien demanding admittance into the United States, nor an alien asking for the privilege of transit through the United States to a foreign country.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus* directed to said William H. Avery, agent at the port of San Francisco
4 for the Toyo Kisen Kaisha, may issue in this behalf so that your petitioner may forthwith be brought before this court to do, submit to, and receive what the law may direct.

FOK YOUNG YO. (Signature in Chinese.)

Witness:
EUGENE W. LEVY.

J. E. FOULDS,
EARLL H. WEBB,
Att'ys for Petitioner.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Fok Young Yo being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition subscribed by him;

that he has read the same, and knows the contents thereof, and the said statements made are true as he verily believes.

FOK YOUNG YO. (Signature in Chinese.)

Witness:
EUGENE W. LEVY.

Subscribed and sworn to before me, this 1st day of October, 1901.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

5 EXHIBIT "A."

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF SAN FRANCISCO, CAL.,
CHINESE BUREAU, *Sept. 25th*, 1901.

Hon. surveyor of customs, San Francisco.

SIR: All Chinese in transit arriving on the S. S. "Nippon Maru," Sept. 19th, 1901, will be permitted to proceed to depart for their destination, with the exception of the following:

Ticket No. 101, Tok Yeung Go, for Guatemala.
" " 93, Chung Hon, for Chihuahua.
" " 97, Wong Wo, for Havana.
" " 98, Wong Hung, for Havana.

These men have been denied the privilege of transit by the hon. collector at this port.

Respectfully yours,
(Signed) JAMES R. DUNN,
Inspector in Charge.

Endorsed: Filed Oct. 1 1901. Geo. E. Morse, clerk. By J. S. Manley, deputy clerk.

Order.

Let writ issue returnable before the court October 2d at 2 o'clock p. m. of that day.

JOHN J. DE HAVEN, *Judge.*

Oct. 1st, 1901.

6 (*Writ of Habeas Corpus.*)

In the District Court of the United States, Northern District of California.

In the Matter of FOK YOUNG YO on *Habeas Corpus*. No. 12480.

The President of the United States of America to William H. Avery, general agent of Toyo Kisen Kaisha Steamship Company, or whoever may have the custody or control of said Fok Young Yo, Greeting:

You are hereby commanded, that you have the body of the above-named person, by you imprisoned and detained, as it is said,

together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable John J. De Haven, judge of the district court of the United States for the northern district of California, at the court-room of said court in the city and county of San Francisco, California, on the 2nd day of October 1901, at 2 o'clock p. m., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness, the Honorable John J. De Haven, judge of the [SEAL.] said district court, and the seal thereof, at San Francisco, in said district, on the first day of October A. D. 1901.

GEO. E. MORSE,
Clerk of said District Court,
By J. S. MANLEY,
Deputy Clerk.

7 In obedience to the within writ, I hereby produce the body of the within-named detained as within directed, and return that I hold the said person in my custody, by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese restriction act.

W. H. AVERY,
Gen'l Ag't Steamship Toyo Kisen Kaisha.

San Francisco, Oct. 1st, 1901.

Endorsed: Issued Oct. 1 1901. Returnable Oct. 2d 1901 at 2 p. m. Filed on return this day of Oct. 2 1901. Geo. E. Morse, clerk of said U. S. district court. By J. S. Manley, deputy clerk.

8 (*Marshal's Return of Service of Writ of Habeas Corpus.*)

In the District Court of the United States, Northern District of California.

In the Matter of FOK YOUNG YO on *Habeas Corpus.* No. 12480.

The President of the United States of America to William H. Avery, general agent of Toyo Kisen Kaisha Steamship Company, or whoever may have the custody or control of said Fok Young Yo, Greeting:

You are hereby commanded, that you have the body of the above-named person, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable John J. De Haven, judge of the district court of the United States for the northern district of California, at the court-room of said court in the city and county of San Francisco, California, on the 2nd day of October 1901, at 2 o'clock p. m., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness, the Honorable John J. De Haven, judge of the [SEAL.] said district court, and the seal thereof, at San Francisco, in said district, on the 1st day of October A. D. 1901.

GEORGE E. MORSE,
Clerk of said District Court,
By J. S. MANLEY,
Deputy Clerk.

9 I, George E. Morse, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a copy of the writ of *habeas corpus*, issued in the within-entitled matter.

Attest my hand, and seal of said district court this 1st of October A. D. 1901.

[SEAL.]

GEO. E. MORSE, *Clerk,*
By J. S. MANLEY, *Deputy Clerk.*

I hereby certify, that on the 1st day of October 1901, I received the writ of which the within is a copy, and that on the 1st day of October 1901, at San Francisco in this district, I personally served the said writ, by delivering to and leaving the same with Wm. H. Avery general agent for T. K. K. Steamship Co., and I also served a copy of the writ on the collector of the port by delivering said copy to E. B. Jerome deputy collector of the port of San Francisco and leaving same with him.

Dated, San Francisco, Cal., Oct. 2d, 1901.

JOHN H. SHINE,
U. S. Marshal,
By E. A. MORSE,
Office Deputy Marshal.

Endorsed: Issued Oct. 1 1901. Filed on return, this day of Oct. 2, 1901. Geo. E. Morse, clerk of said U. S. district court. By J. S. Manley, deputy clerk.

10 At a stated term of the district court of the United States for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 2nd day of October, A. D. 1901.

Present: The Honorable John J. De Haven, judge.

(Number and Title of Case.)

In this matter, the respondent made return to the writ of *habeas corpus* issued herein, and produced the body of the said Fok Young Yo in open court, John E. Foulds, Esq., and Earll H. Webb, Esq., appearing as attorneys for the petitioner, and Edward J. Banning, Esq., assistant U. S. attorney, on behalf of the United States. On motion of Mr. Banning, no objection being made, it is ordered that the hearing hereof be, and the same is hereby, continued until and

set for Saturday, October 5th, 1901, at 10 o'clock a. m. By the court ordered that the said Fok Young Yo be remanded to the custody whence produced pending the hearing hereof.

(Appearance in court.)

11 (*Intervention.*)

In the District Court of the United States in and for the Northern District of California.

In the Matter of the Application of FOK YOUNG YO for a Writ of *Habeas Corpus.*

Now comes the United States attorney for the northern district of California, and by leave of court first had and obtained, intervenes on behalf of the United States in the above-entitled matter, and for ground of intervention alleges:

I.

That said Chinese person is a native of the Empire of China, and a laborer by occupation, and previous to the filing of his petition for a writ of *habeas corpus*, arrived at the port of San Francisco from the port of Hongkong, China, in transit, through the territory of the United States, for the Republic of Mexico.

II.

That the collector of customs for the port of San Francisco, after careful and due investigation, has decided that he is satisfied that the said Chinese person, does not intend in good faith, to continue his voyage through the territory of the United States to the Republic of Mexico, and has denied the said Chinese person for the reasons alleged, the privilege to further continue his journey through the territory of the United States, and has ordered the said person deported to China, the country whence he came.

III.

That the petitioner in this proceedings, is now, and ever has been since his arrival at the port of San Francisco, on board of the Japanese steamship "Nippon Maru," and is lawfully detained
12 there by William H. Avery, agent for the Toyo Kisen Kaisha.

IV.

That this court has no jurisdiction over the person of the petitioner in this proceeding.

V.

That this court has no jurisdiction over the subject-matter of this proceeding.

Wherefore the United States attorney prays that an order be made by this honorable court discharging the writ heretofore issued herein and directing that the said petitioner be remanded to the

custody whence he was taken and for such other and further order as may seem proper.

MARSHALL B. WOODWORTH,
United States Attorney.

EDWARD J. BANNING,
Ass't U. S. Attorney, of Counsel.

Endorsed: Filed October 5th 1901. Geo. E. Morse, clerk. By J. S. Manley, deputy clerk.

13 At a stated term of the district court of the United States for the northern district of California, held at the court-room in the city and county of San Francisco, on Saturday, the 5th day of October, A. D. 1901.

Present: The Honorable John J. De Haven, judge.

(Number and Title of Case.)

John E. Foulds, Esq., and Earll H. Webb, Esq., attorneys for petitioner, and Edward J. Banning, Esq., assistant U. S. attorney on behalf of The United States, intervenor, being present in open court, this matter came on regularly for hearing, and said matter was duly argued by Mr. Webb —, Mr. Foulds and Mr. Banning, and the further hearing hereof continued until Monday, October 7th, 1901.

(Hearing, &c.)

14 At a stated term of the district court of the United States for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 7th day of October, A. D. 1901.

Present: The Honorable John J. De Haven, judge.

(Number and Title of Case.)

This matter this day came on regularly for further hearing, Earll H. Webb, Esq., appearing on behalf of the petitioner, and Marshall B. Woodworth, Esq., U. S. attorney, on behalf of The United States, intervenor. The attorneys thereupon submitted an agreed statement of facts, and said matter was thereupon submitted to the court for decision.

(Hearing continued—submitted, &c.)

15 (*Agreed Statement of Facts.*)

In the District Court of the United States in and for the Northern District of California.

In the Matter of the Application of FOK YOUNG YO for a Writ of *Habeas Corpus.*

The petitioner is a subject of the Empire of China. He arrived at the port of San Francisco on the Japanese steamship "Nippon Maru;" the manifest of which vessel states that he intended to go

to San Jose de Guatemala. Petitioner herein also alleges that that was his intended destination. The collector of customs at the port of San Francisco, did, on the 23rd day of September, 1901, deny the petitioner the privilege of further pursuing his journey to his alleged point of destination. That the petitioner has a ticket, or an order for a ticket, for a through passage from Hongkong, China, to San Jose de Guatemala by steamer. That the petitioner is now held by W. H. Avery, agent for the Japanese Steamship Company, by virtue of an order issued by the collector of customs for the port of San Francisco, directing him to retain the person of the petitioner in his custody, and deport him to China.

Dated October 7, 1901.

J. E. FOULDS &
EARL H. WEBB,
Attorney- for Petitioner.
MARSHALL B. WOODWORTH,
Attorney for Intervenor.

Endorsed: Filed October 7th 1901. Geo. E. Morse, clerk. By J. S. Manley, deputy clerk.

16 In the District Court of the United States, Northern District of California.

In the Matter of the Application of FOK YOUNG YO for a Writ of *Habeas Corpus*. No. 12480.

Opinion.

J. E. Foulds and Earll H. Webb, for petitioner.
E. J. Banning, ass't U. S. attorney.

DE HAVEN, *District Judge:*

The petitioner seeks in this proceeding under a writ of *habeas corpus*, issued upon his application, for a judgment of this court releasing him from the custody in which he is now held, so that he may continue on a journey from the port of San Francisco to the port of San Jose de Guatamala, Mexico. The case has been submitted to the court for decision upon the following agreed statement of facts:

"The petitioner is a subject of the Empire of China. He arrived at the port of San Francisco on the Japanese steamship 'Nippon Maru;' the manifest of which vessel states that he intended to go to San Jose de Guatamala. Petitioner herein also alleges that that was his intended destination. The collector of customs at the port of San Francisco, did, on the 23rd day of September, 1901, deny the petitioner the privilege of further pursuing his journey to his alleged point of destination. That the petitioner has a ticket, or an order for a ticket, for a through passage from Hongkong, China, to San Jose de Guatamala, by steamer. That the petitioner is now held by W. H. Avery, agent for the Japanese Steamship Company,

by virtue of an order issued by the collector of customs for the port of San Francisco, directing him to retain the person of the petitioner in his custody, and deport him to China."

17 Article 3 of the treaty of March 17, 1894, between the United States and China (28 Stats. 1210), contains the provision:

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

Section 1 of the Regulations of the Treasury Department, dated December 8, 1900, vol. 3 Treasury Decisions, page 1000, governing the right of Chinese laborers to pass in transit over the territory of the United States, provides:

"1. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a *bona fide* transit only is intended, and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States."

This regulation of the Treasury Department is valid, and authorized by section 8, of the act of September 13, 1888, (25 Stats. 476), and by section 7 of the Chinese exclusion act of May 5, 1892, (27 Stats. 25). Upon the agreed statement of facts, the contrary not appearing, it must be presumed that the action of the collector of customs in denying the privilege of transit to the petitioner, was based upon the failure of the petitioner to satisfy him that he was intending in good faith to proceed upon his journey from San Francisco to his alleged port of destination in Mexico. Upon this state of facts, the decision of the collector of customs cannot be reviewed and reversed by this court, in this proceeding. The decision of the collector, that he is not satisfied of the good faith of petitioner, can only be reviewed by the Secretary of the Treasury on appeal.

The writ will be discharged and the petitioner remanded.

Endorsed: Filed Oct. 23 1901. Geo. E. Morse, clerk.

18 At a stated term of the district court of the United States for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 23rd day of October, A. D. 1901.

Present: The Honorable John J. De Haven, judge.

(Number and Title of Case.)

This matter having been heretofore submitted to the court for decision, now, after due consideration had thereon, the court renders written opinion, and it is by the court ordered that the petition and writ herein be, and the same are hereby, dismissed, and that the said Fok Young Yo be, and he is hereby, remanded to the custody whence produced.

(Order dismissing writ and remanding petitioner &c.)

19 *Appeal to the United States Supreme Court.*

United States District Court, Northern District of California.

In re Application of FOK YOUNG YO for a Writ of *Habeas Corpus*. No. 12480. Appeal.

The petitioner, Fok Young Yo, by his attorneys, J. E. Foulds and Earll H. Webb, feeling himself aggrieved by the order and judgment entered on the 23rd day of October, 1901, in the above-entitled proceeding, does hereby appeal from the said order to the United States Supreme Court, and prays that his appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the United States Supreme Court.

Dated, San Francisco, October 28th, 1901.

J. E. FOULDS,
EARLL H. WEBB,
Attorneys for Petitioner.

Service of the within notice & petition by copy admitted this 28th day of Oct. 1901.

EDWARD J. BANNING,
Ass't U. S. Att'y.

Endorsed: Filed Oct. 28 1901. Geo. E. Morse, clerk.

20 United States District Court, Northern District of California.

In the Matter of the Application of FOK YOUNG YO for a Writ of *Habeas Corpus*.

Assignment of Errors.

The above-named applicant, in connection with his application for permission to appeal, assigns the following errors which he alleges were committed by the honorable district court on the hearing of this matter:

The court erred in holding that article III of the treaty of March 17th, 1894, between United States and China (28 Statutes, 1210) authorizes the Treasury Department of the United States to make regulations governing the right of Chinese laborers to pass in transit over the territory of the United States.

The court erred in holding that section 1 of the Regulations of the Treasury Department dated December 8th, 1900, vol. 3, Treasury Decisions, page 1000, is a valid regulation and authorized by section 8 of the act of September 13th, 1888, (25 Statutes, 476) and by section 7 of the Chinese exclusion act of May 5th, 1892 (27 Statutes, 25).

The court erred in holding that the agreed statement of facts was sufficient to authorize the presumption that the action of the collector of customs in denying the privilege of transit to petitioner, was based upon the failure of the petitioner to satisfy said collector that said petitioner was intending in good faith to proceed upon his journey from San Francisco to his alleged port of destination.

21 The court erred in holding that the decision of the collector of customs cannot be reviewed and reversed by said court in this proceeding.

The court erred in holding that the decision of the said collector in denying the right of the petitioner to proceed upon his journey, can only be reviewed by the Secretary of the Treasury on appeal.

The court erred in holding that section 8 of the act of September 13th, 1888, is now in force, and that it applies to or governs the rights of Chinese laborers in transit across the territory of the United States to a foreign country.

The court erred in holding that section 7 of the Chinese exclusion act of May 5th, 1892, in any way affects the rights of Chinese laborers in transit across the territory of the United States to foreign countries.

The court erred in holding that the writ should be discharged and the prisoner remanded.

For other errors appearing upon the record.

Whereas, by the law of the land, judgment of the said district court should have been that the order of the collector of the port detaining said petitioner, be set aside, and said petitioner allowed to continue on his journey.

Wherefore, your petitioner prays that the judgment of said district court discharging the writ and remanding the prisoner, be reversed, annulled and held for naught; and for such other relief as may be proper in the premises.

J. E. FOULDS AND
EARLL H. WEBB,
Attorneys for Petitioner.

Service of the within assignment of errors, by copy, admitted this 28th day of Oct. 1901.

EDWARD J. BANNING,
Ass't U. S. Att'y.

Endorsed: Filed Oct 28 1901. Geo. E. Morse, clerk.

22 *Order Granting Appeal.*

In the District Court of the United States, Northern District of California.

In the Matter of the Application of FOK YOUNG YO for a Writ of *Habeas Corpus.* No. 12480.

On this 28th day of October A. D. 1901, came Fok Young Yo, the petitioner herein, by his attorneys, J. E. Foulds and Earll H. Webb, and filed herein and presented to this court his petition praying for the allowance of an appeal to the United States Supreme Court, intended to be urged and prosecuted by him, and praying that his said appeal be allowed, and that a transcript of the record of proceedings and papers in the above-entitled matter, duly authenticated, may be sent to the United States Supreme Court.

On consideration whereof the court hereby allows the appeal prayed for and orders execution and return of the petitioner stayed, pending the hearing of the said case in the said United States Supreme Court.

It is further ordered that the appellant herein shall enter into a bond to the clerk of the district court, with surety to his satisfaction, in the sum of two hundred dollars ($200.00), for the payment of all costs and fees in this matter.

San Francisco, October 28, 1901.

JOHN J. DE HAVEN, *Judge.*
GEO. E. MORSE, *Clerk.*

Endorsed: Filed Oct. 28 1901.

Service of the within order admitted (by copy) this 28th day of October 1901.

EDWARD J. BANNING,
Ass't U. S. Att'y.

23 (*Bond for Costs on Appeal.*)

Know all men by these presents, that we, Fok Young Yo, as principal, and B. A. Harnett and E. L. Wakeman, as sureties, are held and firmly bound unto George E. Morse, clerk of the district court, for the northern district of California, in the full and just sum of two hundred dollars, to be paid to the said George E. Morse, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of October, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a district court of the United States, for the northern district of California, in a proceeding depending in said court, upon an application for a writ of *habeas corpus* made by the said Fok Young Yo, a decision was rendered against the said peti-

tioner, and the said petitioner having obtained from said court permission to appeal from said decision to the United States Supreme Court,

Now, the condition of the above obligation is such, that if the said Fok Young Yo shall prosecute his appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(SIGNATURE IN CHINESE.) [SEAL.]
B. A. HARNETT. [SEAL.]
E. L. WAKEMAN. [SEAL.]

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, } ss:

24 B. A. Harnett and E. L. Wakeman being duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of two hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

B. A. HARNETT.
E. L. WAKEMAN.

Subscribed and sworn to before me, this 31st day of October A. D. 1901.

EUGENE W. LEVY,
Notary Public in and for the City and County of
[SEAL.] *San Francisco, State of California.*

Endorsed: Form of bond and sufficiency of securities approved. John J. De Haven, judge. Form of bond and sufficiency of securities approved. Edward J. Banning, ass't U. S. attorney. Filed Nov. 2 1901. Geo. E. Morse, clerk, by J. S. Manley, dep. clerk.

25 I, George E. Morse, clerk of the district court of the United States for the northern district of California, do hereby certify that the foregoing and hereunto annexed twenty-four (24) pages, numbered from 1 to 24 inclusive, contain a full, true, and correct transcript of the record in said district court in the matter of Fok Young Yo, on *habeas corpus*, No. 12480.

I further certify that the cost of said record, amounting to $12.30, has been paid by appellant.

Witness, my hand and seal of said court at San Francisco, this 9th day of November, A. D. 1901.

[Seal of the U. S. District Court, Northern Dist. of California.]

GEO. E. MORSE, *Clerk.*

Endorsed on cover: File No. 18,331. N. California D. C. U. S. Term No. 478. Fok Young Yo, appellant, *vs.* The United States. Filed November 26th, 1901.

No. 478.
Motion to advance

FILED
DEC 9 1901
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Dec. 9, 1901.

No. 478.

IN THE MATTER OF THE APPLICATION OF

FOK YOUNG YO,

FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO ADVANCE.

MAXWELL EVARTS,
Counsel for Appellant Fok Young Yo.

C. G. Bunnyard, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM 1901.

No. 478.

IN THE MATTER
OF
The Application of Fok Young Yo, for a Writ of *Habeas Corpus*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Motion to Advance.

The appellant, Fok Young Yo, is a subject and citizen of China, and a resident of San José de Guatemala, which is the principal sea port in the Republic of Guatemala, Central America. On the 24th day of August, 1901, he purchased at Hong Kong, China, his passage from there to San José de Guatemala, paying therefor the sum of one hundred and eighty-three (Mexican) dollars, and received a ticket at Hong Kong, from the agent of the Toyo Kisen Kaisha Steamship Company, for passage on the steamship "Nippon Maru," to the port of San Francisco, and an order upon the San Francisco agent of said Steamship Company for a steerage ticket from San Francisco to San José de Guatemala.

Upon the arrival of the steamship at San Francisco, the appellant was on September 19, 1901, examined by an Inspector of the Chinese Bureau and his baggage and private papers were opened and his person was searched, and he was denied the privilege of transit across the territory of the United States in pursuance of the privilege given to him by the last clause of Article Three of the Treaty of March 17, 1894, between the United States and China, (26 U. S. Statutes, p. 1210) and was ordered to be deported to China.

The appellant made no application to enter the United States, or to pass in transit through the territory thereof in any proper sense of the term, but merely intended to leave the ship upon which he arrived at San Francisco, to cross a bonded dock and enter another ship which would carry him to his destination at San José de Guatemala, which is over a thousand miles from the Southern boundary of the United States. In other words, he merely touched at San Francisco, en route for Guatemala.

An application was made by the appellant for a writ of *habeas corpus* and upon the return of the writ, it was dismissed upon the ground that the decision of the Collector ordering him to be deported to China was final and conclusive, so far as the Court was concerned, and that the only remedy which the appellant had was by appeal to the Secretary of the Treasury. From the order of the Court dismissing the writ of *habeas corpus*, the appeal in this case is taken.

The said Fok Young Yo, by his attorney, now moves this Court to advance this cause upon the docket, and to set it down for argument upon such day during the present term, as may be convenient to the Court, for the following reasons.

I. The appellant is and has been since the 19th day of September, 1901, detained and imprisoned in a building on the dock of the Pacific Mail Steamship Company, at the Port of San Francisco, State of

California, and must so remain until this case is heard by this Court.

II. There are now imprisoned in the same building with the appellant, awaiting the decision of this case, more than one hundred Chinamen, who have sought to cross the territory of the United States en route to a foreign country, in pursuance of the privilege granted them by Article Three of the Treaty between the the United States and China, of March 17, 1894.

III. The case presented here is one, not only of great interest to the individual concerned, but raises questions of importance to the Government of the United States, involving the construction of the Treaty between the United States and China of March 17, 1894, and of the Act of Congress entitled "An Act to prohibit the coming of Chinese Laborers to the United States," approved September 13, 1888 (25 U. S. Stat. p. 476).

Notice of this motion has been served on the Attorney-General, and proof thereof filed with the Clerk of this Court.

Dated, November 29, 1901.

MAXWELL EVARTS,
Counsel for the appellant Fok Young Yo.

No. 478.

DEC 2 1901

Mem. of Evarts for Appt.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Dec. 2, 1901.

No. 478.

IN THE MATTER OF THE APPLICATION OF

FOK YOUNG YO,

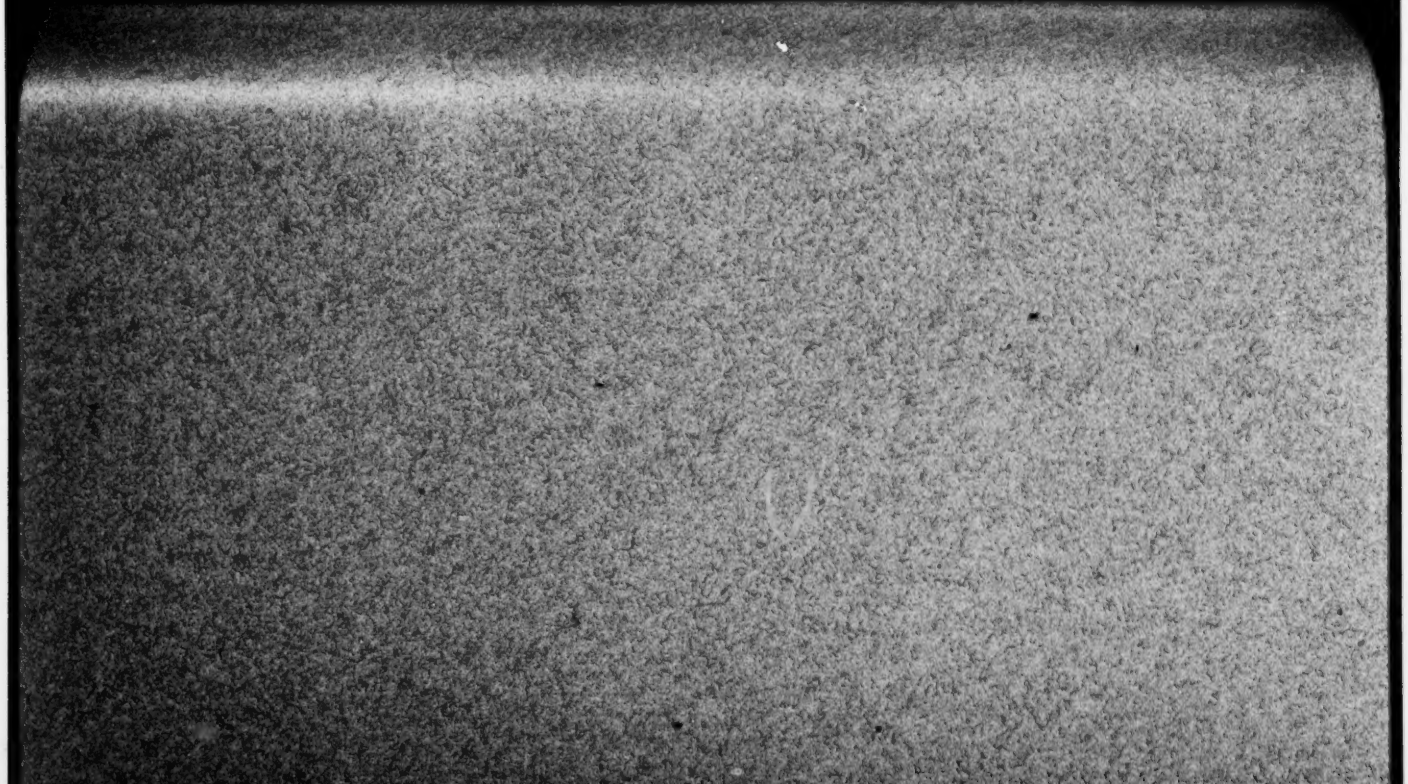
FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MEMORANDUM OF APPELLANT ON MOTION TO ADVANCE.

MAXWELL EVARTS,
Counsel for Appellant Fok Young Yo.

C. G. Burgoyne, Walker and Centre Streets, N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 478.

IN THE MATTER

OF

The Application of FOK YOUNG YO, for a Writ of *Habeas Corpus*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Memorandum of Appellant on Motion to Advance.

The appellant in this case has never sought to enter the United States, nor has he asked the privilege of transit across the territory of the United States, except in the most limited sense. The right to leave the ship upon which he arrived at San Francisco, to cross a bonded dock and to take another ship which would carry him to his destination in Guatemala, has been denied to him, and no reason has been given for such denial.

He is now imprisoned and has been since the 19th of September, 1901. He is guilty of no crime. He

has done nothing wrong. He has simply followed the ordinary route of travel between Hong Kong and Guatemala, a country more than one thousand miles from the United States, and the Collector of the port of San Francisco has refused him this privilege, has remanded him to the country from whence he came, and has undertaken to compel him to go to Guatemala by some steamer which will take him there direct from Hong Kong without touching at a port of the United States. We know of no steamship line which would enable him to do this. If this case should not be advanced for hearing this term, it would mean, either that the appellant would be confined for at least a year, or else that he would have to abandon his case and give up his journey to San José de Guatemala, which is his residence and commercial domicile.

This would seem to be a good and sufficient ground for an early hearing of this case, aside from the other reasons stated in the printed papers submitted on the motion to advance.

The points involved in this case have never been presented to and decided by this Court and are briefly as follows :

I. It is claimed by the appellant that Article III. of the treaty between the United States and China gives to Chinese laborers the right to cross the territory of the United States, in the course of their journeys to or from other countries, and that said right is only subject to such regulations as the Government of the United States may deem necessary to prevent the privilege of transit from being abused. That is to say, the Government of the United States has under the treaty the power to determine the mode and mannner and the conditions under which the Chinese laborer shall make a transit of the country, but that the power to regulate such transit, the right to determine the conditions under which it shall be enjoyed, does not include the power to prevent it. The clause of the treaty referred to is as follows :

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

II. We further insist that, if we are wrong in this construction of the treaty, the privilege of transit certainly cannot be arbitrarily denied, and that the denial of such privilege must be based upon some reasonable ground for believing that the privilege of transit in each particular case will be abused.

III. The appellant also claims that under the clause of the treaty, which has just been quoted, it is necessary that Congress should pass some act authorizing and directing the Secretary of the Treasury to make such regulations as he may deem necessary to prevent the privilege of transit from being abused.

No such act has ever been passed, and any attempted regulation by the Secretary of the Treasury is, therefore, null and void. In other words, there has been no regulation by the government in pursuance of the provisions of this treaty.

IV. The appellant has complied with every attempted regulation of the Secretary of the Treasury in regard to the transit of Chinamen across the territory of the United States.

V. The Court below erred in supposing that the Act of September 13, 1888, entitled "An Act to prohibit the coming of Chinese laborers to the United States" (25 U. S. Stat., p. 476), has any application to this case. That act was made dependent upon the ratification of a then pending treaty between the United States and China. Said treaty was never ratified. The act, therefore, or at least such part thereof as was made dependent upon the ratification of such treaty, never went into effect.

VI. There is no law of the United States making final and conclusive the decision of the Collector of the Port of San Francisco as to the right of a Chinaman to enjoy the privilege of transit across the territory of the United States in the course of his journey to another country, and there is no law of the United States and no decision of this Court which holds that a determination of a Collector of Customs refusing to a Chinaman such right of transit cannot be reviewed and reversed by the Courts upon an application for a writ of *habeas corpus*.

I am authorized by the Attorney-General to say that he has no objection to the advancement of this case for hearing at as early a date as is possible and convenient to this Court, and in view of the importance of this case and the long confinement of the appellant if the case is not heard at this term, I respectfully ask the Court to advance the case for argument.

A copy of this memorandum has been sent to the Attorney-General.

MAXWELL EVARTS,
Counsel for Appellant.

478.

JAN 2 1902

CERTIFIED TRANSCRIPT CASES.

Brief of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 2, 1902.

FOK YOUNG YO,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANT.

MAXWELL EVARTS,
Counsel for Appellant.

C. H. Reynolds, Walker and Centre Streets, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 478.

FOK YOUNG YO,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLANT.

Statement.

Fok Young Yo, the appellant, is a subject of the Empress of China and a resident of Guatemala, Central America (Record, p. 1). On August 24, 1901, he purchased at Hongkong from the agent of the Toyo Kisen Kaisha Steamship Company his passage from there to San José de Guatemala, and paid therefor one hundred

and eighty-three (Mexican) dollars ($183.00), and received from the agent of said company a ticket for his passage on the steamship "Nippon Maru" from Hongkong to San Francisco, and an order upon the San Francisco agent of said steamship company for a ticket from San Francisco to San José de Guatemala (Record, p. 2).

Upon the arrival of the appellant in San Francisco on September 19, 1901, on board said steamship "Nippon Maru," having in his possession his ticket from Hongkong to San Francisco, and his order for a ticket from San Francisco to San José de Guatemala, he was examined by a customs inspector, and his baggage and private papers were opened and his person searched (Record, p. 2).

After such examination of the appellant by said customs inspector, the Collector of the Port of San Francisco denied to him the privilege of transit through this country (Record, p. 3). This transit, which was refused to the appellant, was merely a transshipment from the said steamship "Nippon Maru" to a ship which should carry him to his destination in Guatemala (Record, p. 2).

The effect of the decision of said Collector

denying to the appellant the right of transit across the dock at San Francisco was equivalent to an order for his deportation to China, and he was detained and imprisoned upon the dock of the Pacific Mail Steamship Company by the agent of the Toyo Kisen Kaisha Company prior to his return to China (Record, p. 1).

The appellant thereupon presented to the United States District Court for the Northern District of California, a petition for a writ of *habeas corpus* addressed to the agent of the Toyo Kisen Kaisha Company, directing him to bring the appellant before said Court.

Upon the return of the writ it was dismissed by the Court, and the appellant remanded to the custody of the agent of the Toyo Kisen Kaisha Company upon the ground that the Court had no jurisdiction to review the decision of the Collector, denying to the appellant the right of transit across this country on his journey to Guatemala (Record, p. 8). From the decree dismissing the writ, this appeal has been taken direct to this Court under the Fifth Section of the Act of Congress, approved the 3d day of March, 1891, and commonly called the Circuit Court of Appeals Act.

Assignments of Error.

The United States District Court for the Northern District of California erred:

FIRST. In holding that it did not have jurisdiction to review the determination of the Collector of the Port of San Francisco, denying to Fok Young Yo the privilege of transit across the United States, in the course of his journey to Guatemala.

SECOND. In holding that the decision of said Collector was final and conclusive upon the courts of the United States, and could only be reviewed upon an appeal to the Secretary of the Treasury.

THIRD. In that it did not hold that Article III. of the treaty between the United States and China of December 8, 1894 (Appendix, p. 12), did not give to the United States the right to prohibit to the appellant the privilege of transit across its territory in the course of his journey to Guatemala.

FOURTH. In that it did not hold that said article of said treaty gave to the United States solely the power to regulate the manner and mode of such transit, in order to prevent said privilege of transit from being abused.

FIFTH. In that it did not hold that "the regulations by the Government of the United States," referred to in Article III. of said treaty, related to a governmental regulation—*i. e.*, a regulation authorized and directed by an Act of Congress.

SIXTH. In holding that Article III. of said treaty authorized the Treasury Department of the United States, without further legislative action, to make such regulations as might be necessary to prevent said privilege of transit from being abused.

SEVENTH. In holding that the first section of the Regulations of the Treasury Department, dated December 8, 1900 (3 Treasury Dec., 1000; Appendix, p. 8), was a valid regulation and authorized by Section 8 of the Act of Congress, approved September 13, 1888 (25 U. S. Stat., 476; Appendix, p. 11), and by Section 7 of the Chinese Exclusion Act, approved May 5, 1892 (27 U. S. Stat., 25; Appendix, p. 12).

EIGHTH. In holding that Section 8 of the Act of Congress, approved September 13, 1888 (25 U. S. Stat., 476; Appendix, p. 11), is now in force and has any application to the privilege of transit given to the appellant by Article III. of said treaty.

NINTH. In holding that Section 7 of the Chinese Exclusion Act of May 5, 1892, relates to the privilege of transit given to the appellant by Article III. of said treaty.

TENTH. In not holding that the privilege of transit given to the appellant by Article III. of said treaty cannot be arbitrarily denied to him by said Collector (if it can be denied at all, which we insist cannot be done), and that any denial thereof must rest upon some reasonable ground for believing that the appellant would abuse said privilege of transit, if granted to him.

ELEVENTH. In not holding that the appellant had complied with every condition required by the Regulations of the Treasury Department.

FIRST POINT.

The treaty between the United States and China of December 8, 1894, does not give to the United States the power to prohibit Chinese laborers from crossing this country in the course of their journeys to or from foreign countries.

We are not concerned here with the abstract question of the power of this country to prohibit Chinamen or any other foreign people from

crossing its territory. We concede at the outset that the United States has inherently such power, but we insist that it has never exercised or attempted to exercise it.

On the contrary, this Government, instead of prohibiting the transit of Chinamen through its territory, has solemnly agreed with the Empire of China that the subjects of the latter country, shall have the privilege of transit through and across the United States, upon their journeys to and from other countries. The United States chose to make this stipulation in the treaty with China rather than to prohibit the transit of Chinamen across its territory, and it made the agreement with the single reservation that it should have the right to make such regulations in regard to the transit it had consented to, as would prevent such privilege of transit from being abused.

This is the only expression by the Government of the United States upon this subject, and the first question of interest is, what is meant by the last part of the second paragraph of Article III. of the treaty, which is as follows:

> "It is also agreed that Chinese laborers shall continue to enjoy the privilege of tran-

> sit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused" (28 U. S. Stat. 1210).

We urge that, in the consideration of this question, the familiar rule applied in the construction of a statute, that the obvious meaning of the words used should be adopted, applies with even greater force to a treaty between two countries. In Bate Refrigerating Company vs. Sulzberger, 157 U. S. 1, it is said in the syllabus: "When the language used in a statute is plain and unambiguous, a refusal to recognize its natural obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of Congress." There is in the case of a treaty the additional element of an agreement between two parties, and certainly, in such case, the words used must be given their plain and obvious meaning, having regard to what was in the minds of the contracting parties, and the meaning and purpose of a treaty is not to be changed by executive action, based upon what is believed should be the proper policy of the United States.

Now, what was in the minds of the two "High Contracting Parties" when this Article III. of the treaty was determined on? We say that this, and this only—viz.: that Chinese laborers should have the privilege of transit across our country, and that the United States should have the right, when a Chinaman had started across this country, in pursuance of the privilege given him by the treaty, to so regulate the transit that he would not abuse the privilege. In other words, the United States Government was authorized by the treaty, to make such regulations as would prevent the Chinaman who had applied at San Francisco for leave to cross the country on his way to the City of Mexico, from changing his mind at Los Angeles, leaving the train there, and remaining in the United States, instead of simply crossing its territory. That is to say, it was the intention of the two "High Contracting Parties" when they entered into and ratified this treaty that the United States should so regulate the mode and manner of the transit that the privilege of transit in each particular case would not be abused and the Chinese Exclusion Acts be evaded, but that the Chinaman would go immediately through to the point of exit from

the United States nearest to his ultimate destination. In order to accomplish this, there are various conditions imposed upon the Chinaman seeking the privilege of transit, and, among other things, before he can go forward the transportation company whose through ticket he holds, is required to furnish to the Collector of Customs a bond in a penal sum of not less than $500, conditioned upon the Chinaman's "continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port" (Appendix, pp. 8 and 9).

The result of this regulation is that the transportation companies giving these bonds, which are most strictly enforced against them by the Government, are compelled, for their own protection, to take the Chinamen through to the port of exit under an armed guard, and no regulation could have been enacted more calculated to prevent the privilege of transit from being abused by the Chinamen. There is no opportunity for its abuse, and the whole burden and responsibility of the matter is thrown upon the transportation company whose through ticket the Chinaman holds.

The two "High Contracting Parties," therefore, had regard in their treaty solely to the regulation of each particular transit for the purpose of guarding against the abuse of the privilege, and seeing to it, that the Chinaman actually went through the United States and departed therefrom. Now, what each particular Chinaman might thereafter do, his transit having been accomplished, did not fall within the scope and purpose of the object which the two Governments had in mind when they drafted and agreed to Article III. of the treaty. So long as the Chinaman went through and out of the United States, then he became subject to the provisions of the Chinese exclusion laws, and was of no concern or interest under the provision of the treaty now in question, until he thereafter might make application for leave to cross again this country on his way back to China.

In other words, the privilege of transit which, it was stipulated in the treaty, should be regulated by the United States to prevent it from being abused was each particular transit across its territory, and, when that transit was completed, the matter which the United States was to regulate was ended, and the power of regu-

lation given by the terms of the treaty was exhausted.

So we insist that the United States has never seen fit to prohibit Chinese laborers from crossing its territory in their journey to and from foreign countries. We further say that the United States has expressly given them, by Article III. of the treaty, this privilege of transit, limiting it and qualifying it in no way whatever, but simply reserving to itself the right to regulate the mode and manner and the conditions under which the transit is to take place. Certainly there is no language in the treaty which, under the ordinary canons of construction, can be said to mean, that the Government has stipulated that it shall have the right, whenever it saw fit, to prohibit Chinese laborers from enjoying the privilege of transit solemnly given them by this Government.

As we said in the beginning of this point, we do not for a moment dispute the right and power of the United States to decree such prohibition; but, until it does by an Act of Congress or by a subsequent treaty between the two countries, the Chinese laborer has an undoubted right under the present treaty to cross the United States on his

journey to other countries, and the exigencies of a supposed necessity, do not empower the executive branch of the Government to usurp the powers and duties of Congress and the General Government, and enact regulations which are so carried out as to result in a prohibition to the Chinaman of the enjoyment of a privilege given to him under an agreement between two great and friendly countries.

In short, the power to regulate the manner of transit does not include the power to prohibit such transit. Prior to the treaty, any Chinaman had the right of transit across the United States, and it is impossible to spell out of the provisions of the treaty, any attempted curtailment or limitation of this right. This stipulation of the treaty is but a declaration and incorporation into the agreement between the two countries of the right and privilege of transit as it stood prior thereto, for the purpose of having a solemn recognition thereof by both countries, and there was no thought for a moment between the two "High Contracting Parties" that the situation then existing was in any way to be changed and altered by the treaty, and a power given to prohibit such transit on the pretext of regulating it.

We therefore submit that the treaty in question gave no power to the Collector of the port of San Francisco to prohibit this appellant from stepping from the steamship which brought him from Hongkong, onto the dock and into a steamship which should take him to his destination in Guatemala, at least fifteen hundred miles distant from the boundaries of the United States, and that the decision of said Collector and of the Court below should be reversed, and the appellant allowed to continue his journey to his home in Guatemala.

SECOND POINT.

There is no regulation by the United States Government enacted in pursuance of the provisions of Article III. of the treaty of December 8, 1894, between the United States and China.

Since the ratification of this treaty, there has been no Act of Congress directing or authorizing the Secretary of the Treasury to make any regulation in regard to the transit of Chinese laborers across the territory of the United States, in the course of their journey to or from other countries.

There are, it is true, certain regulations covering this matter issued by the Secretary of the Treasury, and the last of these was issued on the 8th day of December, 1900, and will be found at page 8 of the appendix.

We insist that these regulations are not governmental regulations, or regulations by the Government of the United States, in the sense in which those words are used in the treaty. A governmental regulation is a regulation authorized by Congress, and the mere rule of an executive officer of the Government, which he is not authorized by Congress to make, does not come within the meaning of the term. In other words, before the regulation of the Secretary of the Treasury, in regard to the transit of Chinese laborers across the territory of the United States, can become a governmental regulation, the Secretary of the Treasury must be authorized and directed to make it, by an Act of Congress.

By the treaty between the United States and China, concluded November 17, 1880, a provision was inserted in Article I. in regard to the coming of Chinese laborers into this country as follows:

> "The Government of China agrees that the Government of the United States may

regulate, limit or suspend such coming or residence."

Was it ever argued that any regulation in pursuance of this provision of the treaty could be made by the Treasury Department without authorization from Congress? Or did the Treasury Department ever enact any regulation except under legislative direction? On the contrary, after the Chinese Immigration Treaty of 1880 was executed, Congress passed the Chinese Exclusion Act of May 6, 1882 (22 U. S. Stat., p. 58), and the very title of it shows that a legislative act is necessary in order to carry out a right given to one Government to regulate matters covered by a Treaty. The Act of May 6, 1882, is entitled "An Act to execute certain treaty stipulations relating to Chinese."

In the opinion of the Attorney-General, dated December 26, 1882 (17 Opin.-Atty. Gen., 483, 484), in speaking of the Exclusion Act of 1882, it was said:

> "There can be no doubt that the Act of Congress now under consideration was intended to carry into effect the stipulation in this Article, that the Government of the United States might suspend the immigration of Chinese laborers to this country."

The force of our claim was recognized by the Government and by the Court below, and in order to meet our argument, it was held by Judge DE HAVEN, in his opinion, that the regulations of the Treasury Department upon the question of transit of Chinamen across this country were authorized by Section 8 of the Act of Congress of September 13, 1888 (25 U. S. Stat., 476). The difficulty with the position taken by the Court is that this Act of Congress of 1888 was passed, subject to the ratification of a then pending treaty between the United States and China. This treaty was never ratified. The act, therefore, never took effect, and certainly not the eighth section thereof, for this refers specifically to certain provisions of the treaty, then pending, but never ratified, which are identical with Article III. of the present treaty, and authorized and empowered the Secretary of the Treasury to make such regulations as he might deem necessary to carry out such provisions of the treaty.

In the case of Li Sing vs. United States, 180 U. S., 486, the Act of Congress of September 13, 1888, was considered, and it was there held that its provisions did not go into effect because the treaty then pending was never ratified.

It is true that the Court limited its opinion to the particular portion of the act then before the Court, but we take it that the ground of the decision is as applicable to the portion of the act now in question as to the part of the act then considered by this Court.

In the case of United States vs. Gee Lee, 50 Fed. Rep., 271, which involved a construction of the Act of September 13, 1888, it was held by the Circuit Court of Appeals for the Ninth Circuit that:

> "This Act having been passed subject to the ratification of a Treaty then pending between the United States and the Emperor of China, which was never ratified, is not in force, except section 13 thereof."

The ruling as to the Act of September 13, 1888, in the case just cited, was followed in United States vs. Loo Way, 68 Fed. Rep., 475.

The present Attorney General seems to have already expressed the opinion that it is doubtful if the Act of September 13, 1888, ever went into effect (Appendix, p. 17).

The only argument which can fairly be deduced from the Act of September 13, 1888, is, that the article of the treaty now in question is not self-executing, for the reason that Article

III. of the treaty pending at the time of the passage of the Act of September 13, 1888 (Appendix, p. 11) was the same as Article III. of the present treaty (Appendix, p. 12), and Section 8 of the Act of September 13, 1888, was passed for the purpose of securing a Governmental regulation to prevent the right of transit from being abused. As, however, the Act of September 13, 1888, never went into effect, because the treaty then pending was never ratified, and as no law has been passed by Congress, directing and authorizing the Secretary of the Treasury to make regulations to prevent the privilege of transit given to Chinamen under Article III. of the present treaty, from being abused, there is, therefore, no Governmental regulation upon this subject, and, until Congress does authorize the Secretary of the Treasury to make regulations upon this question, certainly the right of transit cannot be denied to any Chinese laborer who may apply therefor.

It is difficult to see how Section 7 of the Act of May 5, 1892, can have any application to this case, as said act relates only to the exclusion of Chinese from this country and has nothing whatever to do with their right of transit across the

territory of the United States in the course of their journeys to and from foreign countries, and Section 7 simply authorizes the Secretary of the Treasury to make such regulations as may be necessary for the efficient execution of the act.

THIRD POINT.

Any regulation in pursuance of said treaty seeking to prevent the privilege of transit from being abused should be executed in a reasonable manner and not arbitrarily.

If the Court should not agree with the proposition advanced in the First Point of this brief, that the United States never intended by Article III. of the treaty to prohibit the transit of Chinamen across the United States in the course of their journey to and from foreign countries, and should be of the opinion that the regulations issued by the Secretary of the Treasury were Governmental regulations within the meaning of the treaty and authorized by the 8th section of the Act of 1888, we then come to the question whether such regulation can be executed arbitrarily or whether the Collector must not have some reasonable ground to presume that the

privilege of transit is likely to be abused in the particular case before him.

In the present case the appellant was on his way to his home in Guatemala, in Central America, more than fifteen hundred miles from the boundary of the United States. In the case of Lee Gon Yung, argued with this case, the appellant's destination was the City of Mexico. The only two facts before the Collector were that the two men were Chinamen, and were going to Central America and Mexico. There are over seventy-five similar cases, the disposition of which will be determined by the result of these appeals.

We have, therefore, presented here the extraordinary situation that a Chinese Inspector, a subordinate officer of the Treasury Department, examines at San Francisco each Chinaman who applies for the privilege given to him by a treaty between his country and the United States, and arbitrarily denies to him the privilege if he is on his way to Mexico or Central America. Two facts are enough for the Inspector; viz., that the applicant is a Chinaman and is on his way to Mexico. Therefore, says the Inspector: "I deny him the privilege of transit, because I

think that he may come back again across the border at some future time, and that he does not, therefore, intend to now make a *bona fide* transit across the United States."

The inspector acts upon the suspicion, not that there will be any doubt as to the actual transit of the Chinaman, but that the Chinaman may at some future time return surreptitiously across the border into the United States in violation of the Chinese Exclusion Act and not of this privilege of transit. The right of transit is denied to him, not because there is any probability that it will be abused, but for the reason that there is a possibility that at some uncertain day in the future he may attempt to violate the provisions of the Exclusion Act. The Collector affirms the decision of the Chinese Inspector as a matter of course, and the whole question of granting or refusing the privilege of transit rests with the latter.

If the applicant for the privilege of transit desires to cross the United States on his way to England he is permitted to do so, but if any place in Mexico is his destination the privilege of transit is denied. In other words, the Chinese Inspector interprets the treaty as if it read, "It

is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to every place except Mexico and Central America," and we have the extraordinary spectacle of a treaty between two friendly countries nullified by a subordinate officer of one of them, and with the right of appeal from his decision either to the courts (Record, p. 9) or to the Secretary of the Treasury denied (Appendix, p. 13).

We do not here raise any question as to the advisability of the Government making or not making a further treaty with China and insisting upon a stipulation therein that the privilege of transit across our territory shall not be granted to Chinese laborers journeying to points in Mexico, or of the policy of Congress enacting some law to that effect, but we do say that until some such treaty is ratified, or Act of Congress is passed, the conduct of the Chinese Inspector confirmed by the Collector in refusing the privilege of transit solely upon the ground that the applicant is a Chinaman, and his destination Mexico or Central America, can hardly commend itself to an unprejudiced mind, and can certainly not be upheld upon the ground that the regula-

tion of the Treasury Department commits the whole matter to the Collector, and that, if he is satisfied to deny the privilege of transit, the question is ended, no matter how arbitrary his action may be.

It is true that in the case of Lem Moon Sing vs. The United States, 158 U. S., 538, this Court held that the action of the Collector could not be reviewed by the courts by writ of *habeas corpus*, but the law then under consideration has no application here, and we do not understand that the Government will insist that it has. At least, the Solicitor of the Treasury, in a letter of November 9, 1901, has stated that it has not (Appendix, p. 13). We do not see how the Act of August 18, 1894 (28 U. S. Stat., 390), could be said in any way to refer to the present controversy, as upon its face it relates to aliens "excluded from admission into the United States under any law or treaty now existing or hereafter made." The appellant here is not an alien seeking admission into the United States, and certainly, in his character of applicant for the privilege of transit in pursuance of Article III. of the treaty, is not excluded from the United States by any law or treaty.

It is also true that in the case of Nishimura Ekiu vs. United States, 142 U. S., 651, it was held that the decision of an Immigration Inspector as to the right of an immigrant to land in the United States could not be reviewed by the courts because of the Act of Congress of March 3, 1891 (26 U. S. Stat., 1084), which provided that such decision should be final unless an appeal was taken to the Superintendent of Immigration, whose action was subject to review by the Secretary of the Treasury. The decision in the Nishimura case was, however, placed upon the ground that the Inspector's decision was final by reason of the Statute of 1891, and the inference from the language used by the court is that in the absence of such statute the decision of the Inspector would have been subject to review by the courts. At page 660 of the opinion of Mr. Justice GRAY it is said :

> "An alien immigrant prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. * * * But, on the other hand, the final determination of those facts may be entrusted by

> Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

In the case at bar, however, there is no statute which makes final the decision of the Chinese Inspector or of the Collector denying to a Chinaman the privilege of transit given to him by the treaty, and we venture to say, therefore, that the Act of August, 1894, and the decision in the Lem Moon Sing case, and the Act of March 3, 1891, and the decision in the Nishimura case, have no adverse bearing whatever upon the appellant's case; and we go further and say that in the absence of a statute making the decision of a Collector, denying the right of transit under this treaty, final, his conclusions are open to review by the courts by writ of *habeas corpus* under the authority of the Nishimura case and the Lem Moon Sing case.

Leaving out of sight for a moment the fact that the treaty in question was with China, and

the subject matter was the transit of Chinamen, and considering the question as an abstract proposition, is not the situation somewhat remarkable? Here is an agreement that a certain privilege shall be given to one of the parties and that the right to regulate such privilege shall be reserved by the other. This right of regulation is construed and enforced by the party to whom it is reserved in such a way as to entirely take away the stipulated privilege. This would not be countenanced in any construction of an agreement between private parties, and when you add the fact that the agreement here is between two great and friendly nations, and that the nullifying and making ineffective the agreement is the work of an insignificant and very subordinate officer of one of them, without any supposed right of appeal from his decision, the case becomes almost inexplicable, and can probably only be explained by the hatred of the Chinese in San Francisco, which has warped and perverted the judgment of the subordinate officials of the Chinese Bureau there stationed.

It is all very well for the Chinese Inspector to say: I do not deny the privilege of transit to a Chinaman going to Europe; I only deny the priv-

ilege to Chinamen going to Canada, Mexico, Central America, Cuba and Porto Rico, because I suspect that such journey is made for the purpose of clandestinely returning to the United States. I therefore do not override the treaty or read into it new provisions. But it must be remembered that in the nature of things the only Chinamen who would apply for the privilege of transit would be Chinamen going to contiguous countries. A Chinaman going to England would hardly go via the United States. A Chinaman going to Africa or Patagonia would take some other route.

Of necessity, therefore, the Chinese laborers, in the view of the "High Contracting Parties" at the time the treaty was ratified, were laborers going to Mexico, Canada, Cuba and Central America, as they were the only ones who would seek the privilege of transit across our territory, and a denial of this privilege to such Chinamen simply on account of their destination renders the stipulation in the treaty ineffective and void.

We, therefore, respectfully submit that any regulation of the Secretary of the Treasury, the practical application of which results in a prohibition to Chinese laborers of the right of transit

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across our territory, must be executed in a reasonable manner, and the right of transit is not to be prohibited upon general grounds of suspicion resulting from the fact that the applicant is a Chinaman and his destination a town in Mexico or in Central America.

FOURTH POINT.

The appellant has complied with the regulations of the Treasury Department.

I.

The appellant in this case can hardly be said to have made an application to cross the territory of the United States. He simply touched at San Francisco *en route* to Guatemala, and intended only to step from one ship into another (Record, p. 2). He is, therefore, in a somewhat different situation from the appellant in Case No. 482, who sought to cross the territory of the United States on his way to the City of Mexico. The first and only regulation of the Treasury Department which relates to such a case as is now before the Court is the one issued by Secretary McCulloch in a circular dated January 14, 1885 (Syn. Dec. 6722), providing that:

> "Chinese persons who may be compelled to touch at the ports of the United States in

> transit to foreign countries may be permitted to land, under the regulations of January 23, 1883 (Synopsis, 5544), so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination, or the voyage of which may form part of the route necessary to carry them to their destination" (Appendix, p. 5).

This privilege of touching for the purpose of transshipment is shown to have been considered by the Secretary of the Treasury a very different matter from a transit through or across the United States, for in the same circular from which the above quotation has been made are found other regulations governing the transit of Chinese laborers through the United States, in the following words:

> "The regulations contained in decision 5544, and dated January 23, 1883, relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States."

While the regulations as to transit of Chinamen through the United States, above referred to, have been superseded by others thereafter enacted, the provision in regard to Chinamen

who are compelled to touch at a port of this country *en route* to another country have never, so far as we have been able to ascertain, been superseded or repealed. It is true that Secretary Windom in the regulations which were issued by him on September 28, 1889, says, at the end thereof, that "previous regulations on this subject are hereby rescinded," but the subject upon which the Secretary was then making regulations was the subject of the transit of Chinamen through the United States, and not the subject of the right of a Chinaman, compelled to touch at a port of this country *en route* to another country, to be transferred from one ship into another.

We therefore respectfully submit that the regulation of Secretary McCulloch is the only regulation of the Treasury Department applicable to this case. Under this regulation the appellant was entitled to make the transfer from one ship to the other, and there is no treaty, no statute and no regulation which authorized the Chinese Inspector or the Collector at San Francisco to order the appellant to be sent back to China.

II.

The appellant not only has complied with the regulation of Secretary McCulloch, but has also complied with the regulations of the Treasury Department in regard to the transit of Chinamen through the United States. The latest regulation upon this subject is the letter of December 8, 1900, signed by Commissioner Powderly and approved by Secretary Gage (Appendix, p. 8).

The paragraph of this circular of interest here is as follows:

> "I. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said Collector that a *bona fide* transit only is intended, and such ticket and other evidence presented must be so stamped or marked and dated by the said Collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States."

It is to be noticed that all that is required of the applicant as evidence that he intends to make a *bona fide* transit through this country is

> "to produce to the Collector of Customs, at the first port of arrival, a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed."

It is true that the section goes on to say

> "and such other proof as he (or she) may be able to adduce."

This, of course, simply means that, if the applicant can adduce further evidence in addition to or in place of the through ticket (if he should not hold a through ticket), then he should do so. If he exhibits a through ticket but is not able to adduce any further evidence, it is not required of him by the very words of the regulation, so that the circular is certainly entirely complied with, in the case of a Chinaman who is not able to adduce any other proof, if he produces to the Collector a through ticket across the territory of the United States intended to be traversed.

A moment's consideration will show that in nearly every case it would be impossible for a

Chinaman to adduce before the Collector any proof other than his through ticket that he intended to make a *bona fide* transit. In the majority of cases the Chinaman comes to this country with only his ticket and such clothing as he may have, and has nothing whatever to produce outside of this in the way of proof of the *bona fides* of his intention to cross the United States, and it certainly would be unreasonable to require him to produce anything further. He is ignorant of our customs and our ways, and knows nothing of our language. He is simply passing through this country to his destination, and could hardly be expected to have anything about him which would be evidence, one way or the other, as to the character of the transit to be undertaken by him beyond the through ticket which he has bought at Hongkong at considerable expense.

The circular of December 8, 1900 (Appendix, p. 8), amending the circular of Secretary Windom of September 28, 1889 (Appendix, p. 6), is substantially similar in its provisions to the circular of Secretary McCulloch dated January 14, 1885 (Appendix, p. 3), and to the requirements of the regulations of Secretary Folger of Janu-

ary 23, 1883 (Appendix, p. 1), by which it was provided that Chinese laborers seeking the privilege of transit through the United States should obtain a certificate from the Chinese Consul at the port of landing, and, in the absence of such certificate, the following evidence that a *bona fide* transit is intended was required:

> "In the absence of such certificate, other competent evidence to show the identity of the person, and the fact that a *bona fide* transit only is intended, may be received. *The production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the Collector and verified by him.* Such tickets, and all other evidence presented, must be so stamped or marked and dated by the customs officer as to prevent their use a second time."

By this regulation of 1883, the production of a through ticket was "competent proof" that a *bona fide* transit only was intended by the applicant. It was also understood that a man might come to this country without a through ticket, and yet be able to show to the satisfaction of the Collector by other evidence that he intended to make a *bona fide* transit through this country. So this regulation provides for such a case, and

says that a ticket shall be competent evidence, and then speaks of other evidence which the Chinaman may be able to present in case, of course, he has not got a through ticket.

Now, the words "*bona fide* transit" have been in these regulations since 1883, and the substance of the regulations has been the same from 1883 down to the present time, and we insist that, in the present regulation of December 8, 1900, the words "such other proofs as he (or she) may be able to adduce," refer, and are intended to refer, to the case of a Chinaman who for some reason has not a through ticket, and yet may be able to adduce other proof "to satisfy the said Collector that a *bona fide* transit only is intended."

This much is certain. There is nothing in any circular of the Treasury Department on the subject of the transit of Chinamen across the territory of the United States from the first to the last which authorizes the Chinese Inspector at San Francisco to break open the baggage of the applicant, and to subject him to the indignity of a search of his person. The burden is upon the applicant to show that he intends to make a *bona fide* transit of this country. If he fails, then he must return to China. There is, how-

ever, no duty imposed upon, or right given to, the Collector and the Chinese Inspector by the Treasury Regulations to search the person and the baggage of the applicant for leave to cross the territory of the United States. Any evidence procured or developed by such procedure is certainly not adduced by the applicant, which is the only kind referred to in the circular issued by the Secretary of the Treasury.

So we urge upon the Court that, under the very regulations of the Treasury Department now in force, the production of a through ticket across the whole territory of the United States intended to be traversed, and to the foreign destination of the applicant, according to the steamship manifest, is all that is required, and that the appellants in the case at bar and in Case No. 482, argued with this, have complied absolutely with the regulations of the Treasury Department and have done all that it was necessary for them to do thereunder to satisfy the Collector that a *bona fide* transit only was intended. Each bought at great expense a through ticket from Hongkong to their respective destinations. This they had upon their persons, and produced to the Collector. After a full compliance with this regulation,

and a production of the only evidence required thereby, it certainly is an arbitrary exercise of power on the part of the Collector to say that he is not satisfied that a *bona fide* transit was intended by the appellants, and his action should be reversed, and the appellants allowed to proceed upon their journey.

FIFTH POINT.

The United States District Court for the Northern District of California erred in dismissing the writ of habeas corpus for want of jurisdiction.

There is no statute or treaty which makes the decision of the Collector denying to a Chinaman the privilege of transit across the territory of the United States final, and not subject to review by the Courts of the United States.

In the absence of a statute declaring the decision of the Collector final, this Court held, in the case of the United States vs. Jung Ah Lung, 124 U. S., 621, which was an application for a writ of *habeas corpus*, that:

> "The jurisdiction of the Court was not affected by the fact that the Collector had passed on the question of allowing the person to land." (Headnote.)

In the case of Nishimura Ekiu vs. United States, 142 U. S. 651, it was said at page 660:

> "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. * * * But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted." * * *

In the case of Lem Moon Sing vs. United States, 158 U. S. 538, the Court, through Mr. Justice HARLAN, said at page 549:

> "*If the act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the Courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under existing laws or treaties, and was improperly excluded.* But, when Congress went further

> and declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers 'from admission into the United States under any law or treaty,' such decision should be final, unless, reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers was taken away."

We, therefore, submit with confidence that in the absence of any statute upon the subject the Secretary of the Treasury has not the authority to place the rulings of his subordinates beyond the power of the courts to review, and upon this ground alone the decision of the court below should be reversed.

SIXTH POINT.

The judgment of the United States District Court for the Northern District of California, dismissing the writ of habeas corpus, should be reversed.

MAXWELL EVARTS,
Counsel for Appellant.

APPENDIX TO BRIEF.

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(5544.)

Chinese Laborers—Transit Through United States.

Treasury Department, January 23, 1883.

The Attorney-General, in an opinion of December 26, 1882, addressed to the Secretary of State, has decided that Chinese laborers, in transit merely across the territory of the United States in the course of their journey to or from other countries, are neither immigrants nor "Chinese coming to the United States as laborers" within the language of the treaty of November 17, 1880, or the Act of May 6, 1882, and, further, that it is not incumbent upon such passengers to produce the certificates of identification prescribed by Sections 4 and 6 of that Act, provided that, by competent proof, they may otherwise establish their transient status

The Department of State has transmitted the opinion of the Attorney-General to this Department with its approbation. Treasury Decision No. 5313, dated July 20, 1882, is therefore revoked, and the following regulations are adopted by this Department to carry into effect the more recent opinion of the Attorney-General and the views of the Department of State:

1. Where a Chinese consul resides at the port of landing or entrance into the United States by any Chinese laborer claiming to be merely in transit through the territory of the United States in the course of a journey to or from other countries, the certificate of such Chinese consul identifying the bearer by name, height, age, &c., so far as practicable, and showing the place and date of his arrival, the place at which he is to leave the United States, the date when his journey is to begin, and that it is to be continuous and direct, shall be accepted as *prima facie* evidence. And such certificate shall be required in all cases where a Chinese consul resides at such port.

2. In the absence of such certificate, other competent evidence to show the identity of the person and the fact that a *bona fide* transit only is intended may be

received. The production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the collector and verified by him. Such tickets and all other evidence presented must be so stamped or marked and dated by the customs officer as to prevent their use a second time.

3. In the case of numbers of Chinese being transported in a body under the charge of agents or others, the affidavit of such agents or others in charge, with proof satisfactory to the collector, that such laborers will be conveyed without delay across the territory of the United States and delivered on board ship or into foreign territory, may be received in lieu of the tickets required in the foregoing regulation.

Descriptive lists of all such Chinese will be prepared in duplicate and presented to the collector of customs substantially in the form mentioned in the circular of May 19, 1882 (Synopsis 5231), and showing, in addition, the place and date of arrival and the place and date of intended departure, and, when practicable, the route to be traveled. One copy will be retained on the files of his office, and one be forwarded by mail to the collector of customs at the port of exit, who will take pains to see that the passengers duly leave the United States. If they do not, he will report the fact to this Department. One list may be made to include all Chinese transported at one time, and each list should be properly dated, signed and sealed by the collector or his deputy.

Where considerable numbers of Chinese intend to travel from the port of entrance to the port of exit under the charge of an agent, as before mentioned, it will be sufficient to have included, in the descriptive list to be mailed to the collector at the port of exit, the number of persons who are to go forward, the name of the agent in charge, and the route by which they are to travel.

CHAS. J. FOLGER,
Secretary.

COLLECTOR OF CUSTOMS AND OTHERS.

(6722.)

CHINESE PERSONS COMING TO THE UNITED STATES.

TREASURY DEPARTMENT, January 14, 1885.

The following regulations relating to the rights of Chinese laborers to enter the United States are deemed to be in accordance with the recent decision of the Supreme Court in the case of Chew Heong, plaintiff in error, vs. The United States, and the existing regulations relating to the admission of Chinese persons other than laborers into the United States are restated and modified for your information and government:

1. Chinese laborers lawfully residing in the United States, and who left the United States by sea after the passage of the Act of July 5, 1884, are entitled to enter the United States only upon the production of the certificate prescribed in Section 4 of that act, or of the certificate prescribed in Section 5 of the Act of May 6, 1882, in case they depart by land.

2. The fourth section of the Act of May 6, 1882, as amended by the Act of July 5, 1884, prescribing the certificate which shall be produced by a Chinese laborer as the only evidence permissible to establish his right of re-entry into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884, and such persons may be permitted to land without any certificate upon production of evidence satisfactory to the collector of such facts.

3. Chinese laborers residing in this country, at the date of the treaty of November 17, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of the Act of May 6, 1882, and who left the United States before the passage of the Act of July 5, 1884, are entitled to re-enter the United States upon the production of the certificates prescribed by Sections 4 and 5 of the Act of May 6, 1882. Certificates issued under the Act of May 6, 1882, and Decision

6240, before the passage of said Act of 1884, are to be regarded as having the same effect as if said Act of 1884 had not been passed.

4. Chinese persons, other than laborers, coming to the United States for the first time from China, can be permitted to enter the United States only upon the production of the certificate prescribed by Section 6 of the Act of July 5, 1884, such certificate being the sole evidence permissable on the part of the person so producing the same to establish a right of entry into the United States.

5. Chinese subjects, not laborers, desiring to come to the United States from countries other than China, may do so on production of a certificate corresponding to that required by Section 6 of the Act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, if there be one at the port of departure, countersigned by a United States consular officer, or, if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer.

6. Section 6 of the Act of 1884 does not apply to Chinese persons other than laborers lawfully in the United States. Such persons are, by treaty, entitled "to come and go of their own free will and accord," and when they leave the United States are entitled to re-enter on any evidence satisfactory to the collector that they are not Chinese laborers.

For the convenience of such persons and of the customs officers and others, such persons who may desire to depart from and return to the United States may enter the United States on production of a certificate corresponding to that required by Section 6 of the Act of July 5, 1884, to be issued by the collector of customs of the port of departure, which certificate may be *prima facie* evidence of a right to enter the United States.

7. The regulations contained in Decision 5544, and dated January 23, 1883, relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States.

8. Chinese persons who may be compelled to touch at the ports of the United States in transit to foreign countries may be permitted to land under the regulations of January 23, 1883 (Synopsis 5544), so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination or the voyage of which may form part of the route necessary to carry them to their destination.

H. McCULLOCH,
Secretary.

To Officers of the Customs and Others.

CIRCULAR.

TRANSIT OF CHINESE LABORERS THROUGH THE UNITED STATES.

1889.
Department No. 100.
Division of Customs.

Treasury Department,
OFFICE OF THE SECRETARY,

Washington, D. C., September 28, 1889.

To Collectors and other Officers of the Customs:

In view of the opinion of the Attorney-General, promulgated in S. 9519, of July 25, 1889, the following regulations for the transit of Chinese laborers through the United States are hereby prescribed:

1. Any Chinese laborer claiming to be in transit through the territory of the United States, in the course of a journey from and to other countries, shall be required to produce to the Collector of Customs at the first port of arrival a through ticket across the whole territory of the United States intended to be traversed, and such other proof as he may be able to adduce, to satisfy the Collector of the fact that a *bona fide* transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the Customs officer as to prevent their use the second time.

2. Descriptive lists of all such Chinese laborers will be prepared in duplicate in the following form:

Descriptive list of Chinese Laborer in transit through the United States.

Name.	Age.	Occupation.	Last place of residence.

Height.		Complexion.	Color of eyes.	Physical marks.
Feet.	*Inches.*			

Port of ——, —— [Date.] [Seal] —— ——,
Collector of Customs.

The Collector shall be satisfied of the correctness of the descriptive list before affixing his signature and seal.

One of the copies will be retained on the files of the office of the Collector of Customs at the port of arrival and one forwarded by mail to the Collector at the port of exit.

3. The Collector of Customs at the first port of arrival shall take a bond in the penal sum of not less than $200 for each Chinese laborer, conditioned for his transit and actual departure from the United States within a reasonable time, not exceeding twenty days from the date of arrival at such port. The bond may be given either by the transportation company issuing the through ticket, or by some responsible person on behalf of the laborer, and will be canceled on receipt from the Collector of Customs at the port of exit of a certificate showing that the person specified in the descriptive list transmitted to such port has actually departed therefrom, and stating the name of the vessel and date of departure.

Previous regulations on this subject are hereby rescinded.

WILLIAM WINDOM,
Secretary.

(22658.)

Regulations governing passage of Chinese in transit through United States.

[Circular No. 163, amendatory of Circular 100, September 28, 1889.]

TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER-GENERAL OF IMMIGRATION,

Washington, D. C., December 8, 1900.

To collectors of customs and all other officers charged with the enforcement of the Chinese exclusion laws:

Complaints having reached the Department of attempted violations of the laws enacted for the exclusion of Chinese by those who have been allowed to pass through the United States to foreign territory, the following rules are hereby adopted for your guidance in granting permission for such transit:

Any Chinese person arriving at your port claiming to be destined to some foreign country and seeking permission to pass through the United States, or any portion thereof, to reach such alleged foreign destination, shall be granted permission for such transit only upon complying with the following conditions:

1. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a *bona fide* transit only is intended, and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States.

2. The applicant in each case, or some responsible person on his (or her) behalf, or the transportation company

whose through ticket he (or she) holds, shall furnish to the said collector of customs a bond in a penal sum of not less than $500, conditioned for applicant's continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port.

3. The said applicant shall furnish to the collector of customs at the first port of arrival four photographs of himself, to be taken as directed by said collector, which shall be used in the manner specified in the following rules.

4. The collector of customs shall prepare a descriptive list of such applicants, bound in book form, for file in his office, containing as to each applicant information in the following form, to which one of the photographs mentioned in Rule 3 above shall be permanently attached:

Descriptive list of Chinese persons in transit through the United States.

Name.	Age.	Occupation.	Last place of residence.

Height.		Complexion.	Color of eyes.	Physical marks.
Feet.	Inches.			

PORT OF ——, ——,
——, 190—.

I have made a strict examination for, and noted the physical peculiarities of, ——, whose photograph appears hereon, and am satisfied of his (or her) *bona fide* intention to pass through and out of the United States, and have permitted his (or her) landing under bond, for that purpose.

—— ——,
Collector.

(Photograph, with seal of collector partly covering same, but not to cover any part of face.)

[SEAL.]

5. Two copies of the foregoing description must be prepared by the said collector, on corresponding detached blanks, to each of which a photograph of applicant is permanently attached, sealed as above, one of which is to be kept in the files of the collector's office, or in the office

of the Chinese inspector assigned to said collector, and the other to be forwarded by mail to the collector of customs at the proposed port of exit, to the first-mentioned copy being attached loosely the fourth photograph of those required by Rule 3 above.

6. When the applicant reaches the port of exit he (or she) shall be compared by the collector, or inspector assigned to that duty, with the photograph and description contained in the copy of the descriptive list forwarded from the port of first arrival, and if found to agree therewith shall be allowed to pass through to the foreign country of destination, the officer who makes the comparison indorsing on the said copy the following legend, appropriately filled in:

PORT OF (departure), ——, ——
——, 190–.

I have compared —— —— with a copy of descriptive list forwarded by the collector of customs at ——, and, having no doubt of his (or her) identity, have seen him (or her) depart for —— —— via (proper railroad or steamship line)

—— ——, *Inspector.*

Filed in office of collector of customs at —— ——, 190–.

—— ——, *File Clerk.*

7. Upon receipt of a report from the collector that the applicant has passed through the port of exit, as stated by inspector's return according to the foregoing rule, the collector at the first port of arrival shall cancel the bond given in accordance with Rule 2 above.

T. V. POWDERLY, *Commissioner-General.*

Approved:

L. J. Gage, *Secretary.*

ARTICLE III. OF THE TREATY OF 1888, WHICH WAS NEVER RATIFIED.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States they may produce a certificate from their Government or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

SECTION EIGHT OF THE ACT OF SEPTEMBER 13, 1888.

SEC. 8. That the Secretary of the Treasury shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend, such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles.

And he is hereby further authorized and empowered to prescribe the form and substance of certificates to be issued to Chinese laborers under and in pursuance of the provisions of said articles, and prescribe the form of the record of such certificate and of the proceedings for issuing the same, and he may require the deposit, as a part of such record, of the photograph of the party to whom any such certificate shall be issued. (25 U. S. Stat. 476.)

ARTICLE III. OF THE TREATY OF DECEMBER 8, 1894.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused (28 U. S. Stat. 1210).

SECTION SEVEN OF THE ACT OF MAY FIFTH, 1892.

SEC. 7. That immediately after the passage of this act the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants.

Such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application (27 U. S. Stat. 25).

DEPARTMENT OF JUSTICE,

OFFICE OF THE SOLICITOR OF THE TREASURY.

WASHINGTON, D. C., November 9, 1901.

The Secretary of the Treasury:

SIR:

My opinion has been verbally requested by Assistant Secretary Taylor upon the question whether a Chinese laborer who has been denied the privilege of transit through this country is entitled to an appeal to the Secretary of the Treasury.

I have to advise you that I do not think that the right of appeal exists in such a case; first, because I think that the Act of August 18, 1894, providing that the decision of the immigration officers excluding an alien from admission to this country shall be final, unless reversed on appeal to the Secretary of the Treasury, does not apply to Chinese who are merely seeking transit through this country; and, secondly, because the regulation made by the Secretary of the Treasury, that the Collector shall be satisfied of the good faith of the applicant for a transit permit, makes the decision of the Collector in such a case final.

The brief filed by counsel for the applicants is herewith returned.

Very respectfully,

(Sgd.) F. A. REEVE,
Acting Solicitor.

DEPARTMENT OF JUSTICE.

OFFICE OF THE SOLICITOR OF THE TREASURY.

WASHINGTON, D. C., November 12, 1901.

DICTATED BY F. A. R.,
68, 1899.

To the Secretary of the Treasury,

SIR:

In compliance with your verbal request I have further considered the question of the right of appeal to the Secretary of the Treasury from the decision of the Collector denying to an alien Chinaman the privilege of transit across the territory of the United States.

Since my consideration of the question on last Saturday I have heard reargument on somewhat different lines. Mr. Evarts, of counsel for the Chinese, contends with apparent sincerity that free transit across the territory of the United States is a right vouchsafed by the convention of 1894, and cannot be taken away by departmental regulation. In other words, that the power vested in the Government to regulate, relates only to the mode and conditions of the transit, and does not give the Secretary of the Treasury any power to inquire into the intention of the applicant, or prohibit his landing even if satisfied that the Chinaman's object is to evade the purpose of the treaty and remain in the United States. This contention is not worthy of serious consideration. The parties to the convention must have contemplated the right of transit for only such Chinese laborers who in good faith sought the privilege of crossing our country. When there is good reason to doubt his *bona fide* intention, the Government, acting through the proper executive officer, would have the clear right to prevent the intended fraud. The authority to regulate the transit necessarily includes the power to prohibit the landing.

I have already advised you that, in my opinion, the Act of 1894 does not relate to Chinese in transit, but to

aliens who seek to enter and remain in the United States. My attention has been called to a recent decision of Judge DeHaven, who suggests that, while this class of Chinamen are not entitled to the writ of *habeas corpus*, they have a remedy by appeal to the Secretary if they are denied landing by the Collector. The question of the right of appeal was not before the Court, and his remark may be taken as merely *obiter dicta*, and not authoritative. Besides, it is but just to the learned judge to assume that the opinion to which my attention has been called (*In re* Fok Young Yo) has not been reported with the accuracy which should characterize the report of a decision of the Court. For instance, Judge DeHaven more than once, inadvertently of course, locates Guatemala in the Republic of Mexico; and quite as carelessly he is made to remark that the regulation of the Treasury Department relating to Chinese in transit, etc., is authorized by the Acts of 1888 (25 St., p. 476) and 1892 (27 St., p. 25). The first act prohibits the coming of Chinese laborers to the United States, and the second act prohibits the coming of Chinese persons to this country, and has no relation to Chinese passing in transit. The power of the Secretary to make the regulation referred to is given by Art. III. of the treaty of 1894 in the following words:

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

Prior to this treaty, and I believe without any treaty or express statutory authority, the Secretary of the Treasury had the authority to make regulations concerning the transit of Chinese. The Attorney-General held in 1882 that the Secretary of the Treasury had authority to make regulations concerning the transit of Chinese across the country (17 Op., 485; see, also, 18 *Id.*, 368; 19 *Id.*, 369; 20 *Id.*, 693).

While the language of the said Act of 1894 is com-

prehensive, yet I do not believe it was intended to embrace the class of Chinese who seek the privilege of transit across the country, but relates to aliens who have been excluded from admission to the United States, and not to Chinese laborers who desire to "continue to enjoy the privilege of transit across the territory of the United States," subject to such regulations as the Government may prescribe. And I must repeat that in my opinion the right of appeal from the decision of the Collector denying the landing of Chinamen who claim to be in transit is not given by the Act of 1894. Appeals in such cases may be provided for by the Secretary under the power given by the treaty, if he should see fit to exercise it.

The papers submitted are herewith returned.

Very respectfully,

(Sgd.) F. A. REEVE,

Acting Solicitor.

EXTRACT FROM LETTER OF ATTORNEY-GENERAL TO THE SECRETARY OF THE TREASURY DATED OCTOBER 10, 1901 (TREAS. DEC. 23,304).

The act of September 13, 1888, was passed with reference to a treaty between the United States and China then pending, which was never ratified. It has always been doubtful whether any part of this act took effect. Section 1 made it unlawful, after the ratification of that treaty, for any Chinese person to enter the United States "except as hereinafter provided." That would seem to make the entire act dependent upon the treaty. Section 15 obviously was never operative, because it expressly imposed the condition of ratification. The Federal courts in various districts have for the most part held that sections 2–4 and section 15 have no field of operation, but that other parts of the act, especially sections 12 and 13, are in force. And it must be conceded that hitherto the right of appeal of Chinamen from judgments of deportation, under section 13, has been recognized by the courts and not resisted by the Government. Notes to the Treasury Digest of the Chinese Exclusion Laws, 1889, page 15, note 1, and 2 Supplement Revised Statutes, page 141, note 1, state the uncertainty on the subject and cite the decisions. The latter note shows that the formal attitude of the Treasury Department has been that the act of September 13, 1888, was "dependent upon the ratification of the then pending treaty with China, which treaty was not ratified."

The Supreme Court in the case of Wong Wing *v.* United States (163 U. S., 228) mentioned a section of the act of 1888, without discussing or passing upon the validity of that act, as dependent upon the treaty. In the case of Li Sing *v.* United States (180 U. S., 486, 488, 490), the court says:

"But the act of September 13, 1888, was passed to take effect upon the ratification of a treaty then pending between the United States and the Emperor of China, and it is conceded that such treaty never was ratified.

* * * Without finding it necessary to say that there are no provisions in the act of September 13, 1888, which from their nature are binding on the courts as existing statements of the legislative will, we are ready to hold that section 12 of that act can not be so regarded."

I do not undertake now to say that there are no portions of the act which are not in force, but the current doubt whether it is at all operative has an important bearing upon the present inquiry. For the language of section 7, the act of 1888 is followed so substantially in article 2 of the treaty of 1894, and yet with such express variation as to the feature before us, that we are impelled to conclude that Congress deliberated upon the very point, and clearly determined it by establishing that variation instead of the rule of the act. I therefore hold that Article II. of the treaty has thus far replaced and abrogates section 7 of the act, and I so answer your question.

FILED
JAN 16 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1901.

FOK YOUNG YO,
Appellant,
vs.
THE UNITED STATES.
No. 478.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

LEE GON YUNG,
Appellant,
vs.
THE UNITED STATES.
No. 482.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

REPLY BRIEF OF APPELLANTS.

MAXWELL EVARTS,
Counsel for Appellants.

C. G. BURGOYNE, Walker and Centre Street, N. Y.

Supreme Court of the United States.

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FOK YOUNG YO, Appellant, vs. THE UNITED STATES.	No. 478.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Reply of Appellants to Appendix to Government's Brief.

On page 2 of the appendix to the brief for the United States, which has been filed since the argument of these cases, it is stated that "the production of a

through ticket is one item of competent evidence and other evidence is contemplated." It is to be noticed that the character of this "other evidence" is not stated by the Attorney-General, and no suggestion has ever been made either at the argument or in the briefs as to what this additional evidence should be. The regulation is simply to the effect that the applicant shall produce a through ticket "and such other proof as he (or she) may be able to adduce." We most earnestly insist that this additional proof is to be produced only in case the applicant *may be able* to do so. There is nothing obligatory upon him to produce further evidence, and the regulation does not require that the right of transit should be denied because of the failure to do so. As it seems to us, this additional clause was inserted to cover the case of a man who, by reason of accident or other cause, had no through ticket, but might be able by other means, to satisfy the collector that a *bona fide* transit only was intended.

Further on in this same paragraph the Attorney General says:

> "Certainly in the investigation of this subject the examiner may obtain and consider all other evidence, and is not restricted to that which the Chinaman may adduce in his own behalf."

While we do not wish to be technical in our construction of the regulation of December 8, 1900, yet, as we understand it, there is no obligation placed

upon the collector to take any steps whatever in the matter. The burden is placed upon the applicant. It is his business to satisfy the collector that a *bona fide* transit only is intended. If he fails to do so, then the duty of the collector is simply to order his deportation. There is nothing in the regulation which requires the Collector to affirmatively seek for evidence upon the subject and to show an absence of good faith. If he is not satisfied that the applicant intends to make a *bona fide* transit, then it is not for him to make a case in support of his conclusion, but the burden of showing good faith is upon the applicant alone, and he is required to satisfy the Collector in that regard. If, in the opinion of the applicant, the Collector is not justified in his conclusion that a *bona fide* transit is not intended, and has no basis for such determination, then we say, that the Collector cannot arbitrarily deny the right of transit, that in the present state of the law his decision is not final, and that in such a situation a question is presented for review by the Federal Court on a writ of *habeas corpus*.

We certainly insist that, if there is any obligation upon the Collector to prepare and made a case against the applicant, then there is no regulation requiring and no authority given to him to search the person of the applicant or to break open his baggage. We say that this is constantly done, and it is so stated by the record to have occurred in both of these cases. As the Government has departed in its brief, argument and appendix to its brief, so far from the

record in these cases, we think it is not improper to say that, although in these two particular cases, there may have been no papers or letters found upon the person of the appellants, or in their baggage, yet in the cases which are awaiting the decision of these two cases, the Government did, by breaking open the baggage of the applicants and by searching their person, discover many papers and letters which were perfectly innocent in themselves. The Chinese inspector, however, decided that the mere fact that the Chinaman had a letter in his possession, no matter to whom it was addressed or what it was about, was to be considered evidence of an intention not to make a *bona fide* transit. It was sufficient that the applicant had a letter in his possession. The innocent character of that letter was never for a moment considered, and in the application to the Secretary of the Treasury, it was explained to him that the letters which the Government had referred to in the records of the cases against the Chinamen were none of them of a character which in any way tended to convict the applicant of an intention not to make a *bona fide* transit across the country, and that they equally failed to show any intention whatever on the part of the applicant of returning to this country across the border of Mexico. Reference is made to the finding by the Government of letters on the persons of the applicants for the purpose of showing that the Government does as a matter of fact search the persons of these applicants and does break open their baggage in order to make out a

case showing that the applicant did not intend to make a *bona fide* transit across the territory of the United States. If the doctrine of *uberrima fides* is to be observed in the construction of a treaty, certainly it should be in its application. The letters found were themselves no evidence of any want of good faith, and the construction put upon the mere fact of the finding of the letters was simply a part of the general plan of the Chinese Bureau to prohibit the crossing of our country by Chinamen when their destination was in a country contiguous or adjacent to the United States.

It is now proposed that a law should be passed by Congress giving to the Chinese Inspector the right to search the persons of the applicants, and to open their baggage (see Appendix).

In the original brief of the appellants and in the argument it was stated that the Chinese Inspector, upon mere suspicion alone, prevented the appellants and the other Chinamen, who are now awaiting the decision of these cases, from crossing the territory of this country. This statement was made from what was known to be the fact, as it appeared in the cases before the Secretary of the Treasury, which he was asked to review. It was given in many of them by the Chinese Inspector as a reason for refusing the privilege of transit, that he "suspected" that the applicant might thereafter undertake to return across the boundary of the United States.

It is submitted that a mere suspicion is no reason for refusing to the Chinaman the right stipulated in

the treaty between the two countries, and that certainly it is not enough when there is no fact upon which such suspicion is founded, except that the applicant is a Chinaman and is going to a country adjacent to this.

It is sought by the Government in its brief and argument to make something out of the fact that, upon reaching Mexico, the Chinamen are all unshipped in squads. The argument which, it is desired, should be drawn from this statement, seems hardly to be justified, as it is common knowledge that the Chinamen are taken by the transportation companies across the United States under an armed guard, in box cars, and that the duty of the transportation company is entirely concluded when the Chinamen have been taken out of the United States and into Mexico. Of course the transportation company, having taken the Chinamen out of the United States and having fully complied with its duty, then liberates the Chinamen. There is no obligation imposed upon the transportation company of seeing each applicant through to his final destination—in the City of Mexico, or in Central America, or in Cuba or in Porto Rico. Its duty is fulfilled when it takes the Chinamen through and out of the United States, and as the Chinamen are taken through the country in squads, they are necessarily liberated in squads as soon as they are placed upon foreign territory and out of the United States. They then go forward to their respective destinations.

II.

The Government, on page 3 of the appendix to its brief, has undertaken to answer what was said in the oral reply to the argument of the Attorney-General, that it was true that the percentage of applicants refused the privilege of transit was less than it had been, and that this diminution was possibly due to the fact that the matter had been taken up with the Treasury Department in November last. The argument of the Government in answer to this statement would seem to be a complete corroboration of it.

From 1883 to 1901 there were 37,688 applications for transit, *and not one was refused* (Government's Appendix, p. 3).

Suddenly in the last six months of 1901 the refusals grew from not one for eighteen years to nearly twenty per cent. of the applicants in the last six months of 1901, and almost that entire twenty per cent. occurred prior to the matter being taken up by the Treasury Department in November, as since that time the refusal of the right of transit has been very small.

It is certainly remarkable that this right of transit should never be refused in a single instance for eighteen years, and then should suddenly rise to the large proportion of twenty per cent. of the applications in the last six months of 1901, especially when you consider that the refusal of the privilege of transit was confined to three or four

months of such period. It is possibly a mere coincidence that this sudden zeal in denying the privilege of transit occurred at a time when the agitation was first beginning in California, for the purpose of creating a renewed feeling of hostility to the Chinese, in order to enact a further and more severe law excluding them from our country.

The Attorney-General in his brief has said that it was inaccurate to say upon the argument in behalf of the appellant that the diminution in the refusal of the privilege of transit was due to the fact that "the Government is conscious of having gone too far." If it was so stated on the oral argument, it would seem a far more accurate conclusion than that of the Government in its brief, when it says that "there are less refusals at the moment, because the necessary lesson has been taught and the fraudulent applications have largely ceased." If the number of applications at San Francisco for the privilege of transit has in any way diminished, since in August and September the greater number of applicants were refused the privilege, the reason for such diminution is that the transportation companies were unable to give an absolute assurance to a Chinaman purchasing a through ticket to a foreign country via the United States that this country would fulfill the stipulation of the treaty of 1894, and permit him to cross its territory in the course of his journey.

Certainly it is somewhat extraordinary that this decrease in the number of applicants, to whom the privilege was denied, followed almost immediately upon

the question being taken up in the Treasury Department.

III.

It is stated in the appendix to the Government's brief that the Chinaman has no right of appeal to the Secretary of the Treasury from the decision of the Collector denying to him the privilege of transit.

At page 4 of the brief it is said, "But the Government does deny * * * that the Chinaman has the right of transit or the *right to appeal.*" Again, on page 6 of the brief there is a quotation from the letter of the Secretary of the Treasury to the Collector of Customs at San Francisco, dated November 18, 1901, in which it is stated that the Collector "as the last resort of Chinese seeking the privilege of transit," should give attention to the cases of Chinamen applying for such privilege. In other words, the Secretary of the Treasury wrote to the Collector that his decision upon this question was final, and could not be reviewed by the Secretary of the Treasury.

This letter of November 18, 1901, we have never seen nor heard of before, but it certainly sustains the statement to the Court on the oral argument that the cases which were appealed to the Secretary of the Treasury, and which did not contain one word of the Chinaman's case, but consisted only of evidence taken by the Government in a secret proceeding, and with

the power of searching the applicant's person and breaking open his baggage, would have all been reversed if an opportunity had been given to bring them up for review and properly present them. The Secretary of the Treasury frankly said in this letter to the Collector that "*the department is impressed with the apparent bona fides of the representations of certain of the appellants.*" If the department was impressed without a due presentation of the cases, and upon the mere written representation of the Chinese Inspector that the right of transit should be refused, then the appellants state more confidently than ever before that, if an opportunity to fully and fairly present these cases had been given, not in a single instance would the privilege of transit have been refused.

Prior to the appeal to the Secretary of the Treasury, the Collector was persuaded to hear the facts in one case, and, upon the presentation to him of the Government's case alone, it was insisted by him that the man should be allowed to proceed upon his journey across our country. This was the only case in which a hearing was granted by the Collector. In view of the large number of cases in which it was claimed that the right of transit had been improperly refused, it seemed to him that the matter should be taken up with the Treasury Department in order to get some definite decision governing the subject, as he had not the time and opportunity to give a separate hearing upon the merits to each one of the cases.

IV.

The position of the appellants in this case is that there is no statute, treaty or regulation which makes final the decision of the Collector when adverse to the right of transit. They simply ask for an opportunity to present their case. They do not object to the provision of the regulation (if it is a Governmental regulation, which they deny) that the Collector should be satisfied as to the *bona fides* of the transit intended, but they do object to the Collector determining that such transit was not intended in good faith, upon no evidence tending in any way to support such conclusion. The regulation that he should be satisfied of the *bona fides* of the transit intended does not mean that he should be dissatisfied, without any evidence or reason for such dissatisfaction. When such a case is presented the appellants insist that it is proper for the Court to examine into it, on a writ of *habeas corpus*, and determine for itself whether, in its opinion, the privilege of transit was rightly refused. The appellants are not asking for any favor, nor are they seeking for an opportunity to escape from or avoid the provisions of the Exclusion Act, but merely ask the Court for an opportunity to state their case. All that they desire is to be heard, and certainly no harm can come to the United States by granting their request.

The real questions in this case are:

FIRST. Whether a department of the Government of the United States can initiate, create and execute on its

own motion a policy which is carried out as if it were the policy of the whole people of the United States as represented by Congress?

The statements contained in the appendix to the brief of the Government, show that this has been done in the present case. For eighteen years it has been the policy of the United States to grant the privilege of transit to every applicant. Suddenly, without any authorization from Congress, or without any evidence that it is the intention of the United States to depart from that policy, the Chinese Inspector without warning denies to one-fifth of all the applicants the privilege of transit. He claims to have the power to do so from a regulation of the Treasury Department unauthorized by statute or by Treaty, and we respectfully submit that the question of whether a few Chinamen may find their way accross the southern boundary of this country in violation of the Exclusion Acts is of small moment compared with the establishment of the principle, that a Chinese Inspector may of his own motion, inaugurate and execute a policy towards a friendly country, which can hardly be agreeable to the latter, without any opportunity upon the part of the Courts of the United States or of his superior officer, the Secretary of the Treasury, to review what he has done.

SECOND. The Government insists that the Secretary of the Treasury has the power to place, by regulation, the decision of his inferior officers beyond the review of the courts. This is certainly a novel and radical

proposition, and we respectfully submit that, whether the Treasury Department can make the decisions of its inferior officers final and not subject to an appeal therefrom, either to the courts or to the Secretary of the Treasury, is a question which will bear most careful consideration.

V.

We have not undertaken to say that the policy initiated and created by the Chinese Bureau of the Treasury Department is not an advisable one. Whether it is desirable to search the person and baggage of Chinamen applying for the privilege of transit across our territory, and whether it is advisable that a determination by the Collector adverse to their application should be final, is something for Congress to determine. Our position is, that in the absence of any such determination by Congress, it is not for the Collector to act on his own motion. We insist that before the Collector can execute this policy, which he thinks desirable, he must be authorized to do so by an Act of Congress. The answer to this argument is not plain, and its force has been felt by the Treasury Department, for by Section 27 of the bill introduced in the House of Representatives, on December 6, 1901, by Mr. Kahn (after a hearing of these cases in the Treasury Department) it is provided:

"That any Chinese person or person of Chinese descent, who shall seek the privilege of transit, if by land, through and across any part of the United States or its territories, or by water carriage, through or to and from any port thereof * * * *shall submit to an examination of his person and baggage* * * * and the refusal to grant permission to any such person to exercise such privilege by the officer designated to consider and determine applications for such permission at any port of arrival *shall be final.*"

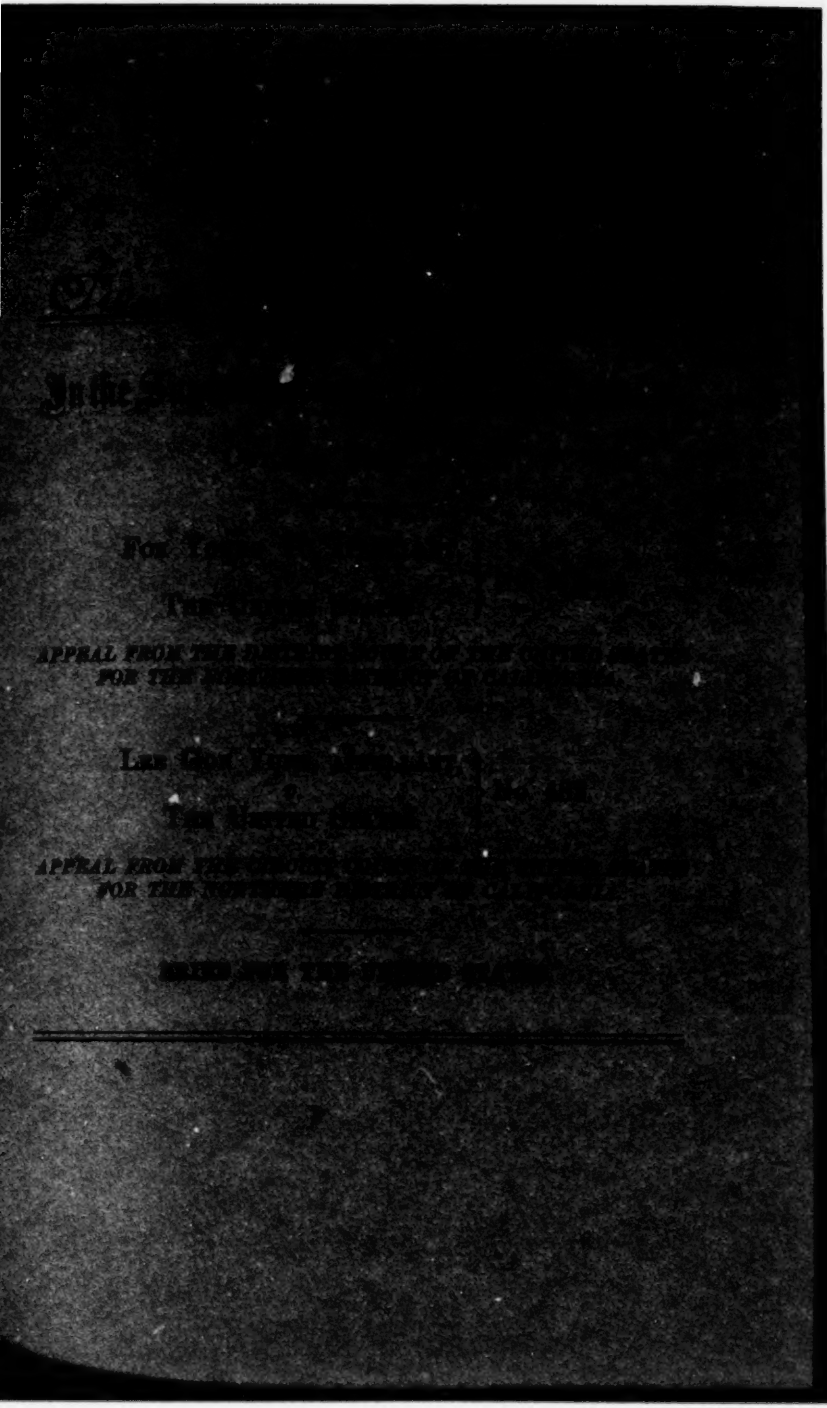
MAXWELL EVARTS,
Counsel for Appellants.

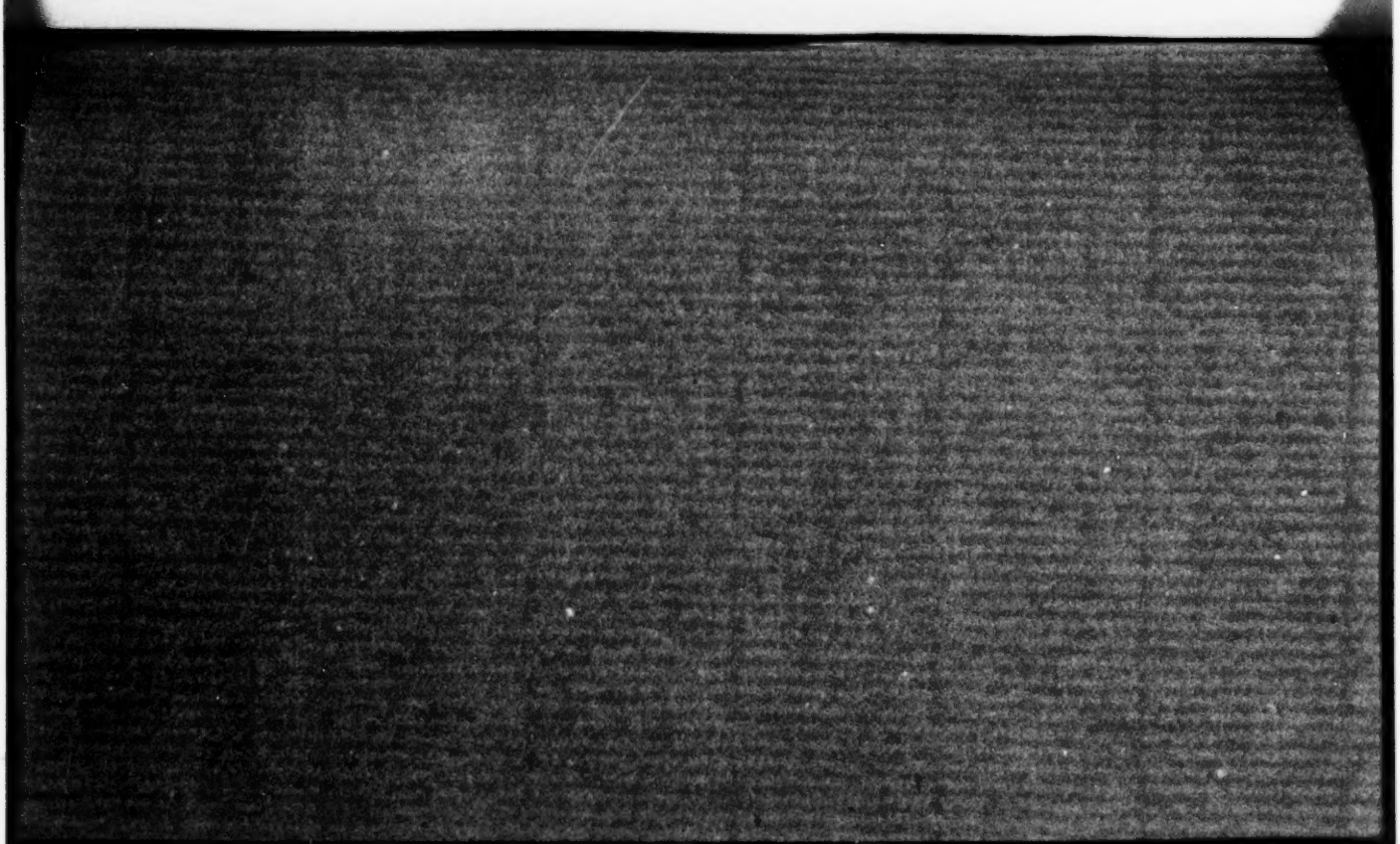
APPENDIX.

SECTION 27 OF BILL INTRODUCED BY MR. KAHN IN THE HOUSE OF REPRESENTATIVES, DECEMBER 6, 1901.

SEC. 27. That any Chinese person, or person of Chinese descent, who shall seek the privilege of transit, either by land through and across any part of the United States or its territory, or by water carriage through or to and from any part thereof, or through and across any of the waters under the jurisdiction of the United States, as provided in Article Three of the Convention of December eighth, eighteen hundred and ninety-four, hereinbefore referred to, *shall submit to an examination of his person and baggage*, and to such investigation as may be deemed necessary by the officers charged with the enforcement of this act, and shall establish to the satisfaction of such officers that he intends solely to proceed immediately to an ultimate destination beyond the United States or its territory; that he has the assurance of employment or occupation at such ultimate destination, and that he does not intend to make use of said privilege as means of obtaining unlawful entrance to the United States or its territory; and such Chinese person, or person of Chinese descent, shall comply in all respects with

the rules and regulations in regard to such persons seeking permission to exercise said privilege which may be issued from time to time as hereinbefore provided, and *a refusal to grant permission to any such person to exercise said privilege by the officer designated to consider and determine applications for such permission at any port of arrival shall be final.*





In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FOK YOUNG YO, APPELLANT,
v.
THE UNITED STATES. } No. 478.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

LEE GON YUNG, APPELLANT,
v.
THE UNITED STATES. } No. 482.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are appeals from judgments of the lower courts discharging the writs and remanding the petitioners.

In the case of Fok Young Yo the application for the writ (Rec., pp. 1, 2) and the agreed statement of facts (pp. 7, 8) show that he is a Chinese subject who arrived at San Francisco by steamship, alleging an intention to go to San Jose de Guatemala, in Mexico,

for which place he had purchased a ticket at Hongkong, entitling him to passage to San Francisco and thence by sea to the said destination in Mexico. The collector of customs at San Francisco denied him the privilege of pursuing his journey to his alleged destination. The intervention on behalf of the United States (p. 6) states "that the collector of customs at the port of San Francisco, after careful and due investigation, has decided that he is satisfied that the said Chinese person does not intend, in good faith, to continue his voyage through the territory of the United States to the Republic of Mexico," for which reason the privilege of transit was denied.

In the case of Lee Gon Yung the application for the writ (pp. 1, 2) states that he is a Chinese subject, and purchased passage from Hongkong to the City of Mexico by steamship to San Francisco and thence by rail to his destination; that, after examination, the collector of customs at San Francisco refused the privilege of transit. In this case also the intervention of the United States (pp. 6, 7) alleges a careful and due investigation by the collector of customs. Demurrers were entered to the intervention filed on behalf of the United States and to the return to the writ (pp. 7, 8), which were overruled by the court (p. 9).

In both cases the intervention of the United States shows a finding by the customs authorities that the petitioners are laborers. In both cases the opinion of the court was that the decision of the collector of customs is not subject to review by the courts (Rec., No

478, p. 8; Rec., No. 482, p. 10). These appeals followed; the assignments of error (No. 478, p. 10; No. 482, p. 15) being based on these propositions:

That the treaty of 1894 does not authorize the Treasury Department to make regulations governing the privilege of transit, and that the Treasury regulation involved here is not valid; that the courts have jurisdiction upon habeas corpus proceedings, and may review the decision of the collector.

ARGUMENT.

I.

THE DEMURRERS IN NO. 482.

The demurrers to the intervention by the United States and to the return to the writ in No. 482 are not meritorious for two reasons—

(1) Because the right of the United States Government to appear and sustain the application of the treaty and regulations to such cases is fundamental and necessary. No other person, natural or artificial, is entitled or qualified to resist the admission into or transit across the United States of Chinese persons. The contrary view would mean that the hearing upon a writ of habeas corpus in such a case must be *ex parte*, and no defense of the Government's action and no presentation of its construction of the law could be heard.

(2) Because both demurrers are frivolous. The return to the writ (p. 5) alleges the order of the collector of customs as the ground of detention, and thus goes to the heart of the controversy. If the opinion

and judgment of the court, as based upon any of the fundamental contentions on the merits, are correct, these preliminary contentions may be ignored as futile, and, indeed, were probably interposed for purely formal reasons.

II.

THE MERITS; THE TREATIES AND UNDERLYING PRINCIPLES.

The case presented on the merits is just this: These men were seeking the privilege of transit through the United States on the allegation that they were *en route* to *bona fide* final destinations in foreign territory, in the one case by touching at San Francisco and transshipping to another vessel, which would carry the applicant through the port and coastal waters of the United States to a port on the west coast of Mexico, apparently near the boundary line of Guatemala; in the other case by rail transit through a portion of the United States on the way to the City of Mexico. There was due investigation in each case and a decision denying the application. Was the privilege of transit properly refused?

The treaty of 1880 (22 Stat., 826) contains no express stipulation on this subject. The language which declares that while the United States may regulate, limit, or suspend Chinese immigration, they may not absolutely prohibit, refers especially to the coming of Chinese laborers into the United States or their residence therein; that is to say, does not refer to the privilege of transit. The language by which rights and privileges of the most-favored nations are accorded to

Chinese subjects refers to Chinese of the permitted classes proceeding to and not through the United States, and to Chinese laborers who were then in the United States. The subsequent treaty and laws show as one of their main purposes that even this allowance to such Chinese persons to go and come of their own free will and accord has been much curtailed. So Article III of that treaty refers to Chinese persons who are either permanently or temporarily residing in the United States and does not refer to transit.

These observations are made because the treaty of 1894 (28 Stat., 1210) provides in Article III "that Chinese laborers shall *continue* to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused." The privilege thus recognized as continuing was one granted not by the previous treaty or laws, but by administrative recognition under regulations of the Treasury Department. Judge Morrow traces the evolution on the subject (No. 482, p. 13).

Looking back to the Burlingame treaty (16 Stat., 739), it is apparent that in this convention also there was no special reference to the privilege of transit. In Article V, in reprobating any other than voluntary emigration, the United States and the Emperor of China agree that man has an inherent right to change his home and allegiance, and that there is mutual advantage in the free migration of their respective citizens

and subjects from one country to the other for purposes of curiosity, trade, or as permanent residents. In Article VI there is a reciprocal agreement that citizens of either country, visiting or residing in the other, shall enjoy the privileges of the most-favored nations as to travel or residence.

As to the underlying principles of the law and comity of nations, Kent says (1 Kent Comm., 9th ed., p. 37):

> Every nation is bound in time of peace to grant a passage for lawful purposes over their lands, rivers, and seas to the people of other states whenever it can be permitted without inconvenience, and burdensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners or their merchandise injurious to those interests of their own people, which they are at liberty to protect and promote, they are at liberty to withhold the indulgence. The entrance of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it.

In a note to this passage (p. 38, note a) the learned chancellor thus comments on a foreign criticism of the restrictions abroad on the transit and sojourn of foreigners:

> But I am of opinion, notwithstanding, that every government has the right and is bound in duty to judge for itself how far the unlimited power of emigration and of the admission and

residence of strangers and immigrants may be consistent with its own local interests, institutions, and safety.

Even as to the peculiar right claimed *ex necessitate* by the United States to descend to the sea over navigable rivers entering the sea in foreign territory, as formerly in the case of the Mississippi and now down the St. Lawrence, Kent's view is that this right is doubtless one of imperfect obligation, but one that can not justly be withheld without good cause. (Id., p. 38.) Great Britain's contention in the early part of this century was that the right of passage was not an absolute natural right, but an imperfect right restricted to the right of transit for purposes of innocent utility, to be exclusively determined by the local sovereign. (Id., note *b*, p. 39; Wheaton's Elements of Int. Law, 3d ed., 248–257; Wheaton's History of the Law of Nations, pp. 506, 517.) This was the English view still in 1854, for by the reciprocity treaty of that year (10 Stat., 1089, Art. IV) an express grant of the privilege of passage over the St. Lawrence and connecting canals of Canada was made to citizens of the United States, and there was an explicit retention by Great Britain of the right to suspend this privilege on giving notice to the United States. On the larger claim of this Government, Kent says: "Mr. Wheaton in his Elements of International Law, 3d ed., 1842, very justly confined such a claim of dominion of the State to the seas and rivers *entirely inclosed within its limits.*" (1 Kent Comm., note *b*, pp. 39, 40; note 1, p. 40.)

It is true that by Articles XXVI, XXVII, and XXVIII of the treaty of 1871 with Great Britain (17 Stat., 863) reciprocal privileges of navigation on the St. Lawrence and other rivers and on the Great Lakes were granted forever or for a term of years, respectively. But the limitation of time in the one case and the restricted enjoyment as to the use of the Canadian canals in the other (Art. XXVII) merely emphasize the contention which we make that liberty of passage is not a general and perfect right in international law, but is a privilege only which requires recognition and agreement.

Calvo remarks (Le Droit International, Paris, 1896, Tome II, sec. 700) that every State is free to admit foreigners to its territory, or exclude them in case of necessity on motives of public order. *A fortiori* it is free to admit them only on certain conditions or under certain restrictions. Nevertheless the usage generally followed by governments permits in times of peace the entrance of foreigners to its territory, liberty of transit, of engaging in commerce, temporary sojourn, or settlement. But it is well understood that every individual who presents himself on foreign territory undertakes tacitly by that fact alone the obligation of submitting himself to the laws of the country which receives him, etc.

It is not necessary to point out Calvo's criticism, in passages of the context, of the national spirit and national codes which are hostile or burdensome to foreigners, nor his approval of the ethical progress by

which the spirit of strict reciprocity under conventions has been abandoned for the more enlightened notion of the voluntary admission of nationals and foreigners to a footing of equality as to civil rights and privileges. For it can not be doubted that our history and policy have in general realized the most enlightened views in this direction; and in the special case of the Chinese our policy of insistence on restriction and control is not only within our sovereign power, and has not only been deliberately adopted and maintained as necessary in the peculiar circumstances, but (it is to be remembered) our conduct toward China with respect to immigration and transit has been and is to-day far more liberal upon the whole situation than is that of China toward us. The balance of reciprocal rights and privileges shows beyond question that China receives far more than she grants. (Dissenting opinion of Mr. Justice Field in *Chew Heong* v. *United States*, **112** U. S., 536, 567–570.) We hear mainly one side of the case, namely, the situation here, and this obscures the extremely limited nature and extent of our rights and privileges in China. The greater part of her vast domain is absolutely shut to us, while a Chinaman who is entitled to any rights or privileges in the United States or their possessions, whether of entry or transit, may exercise his immunities (with few limitations) as fully in one portion of our national domain as another. Nor is it to be forgotten in this time of curious admiration for past philosophies that on the whole our instinct of protection is founded on

the justifiable conviction that our standards of life and conduct are safer for China than China's for us, and that China can not fairly complain until she has granted some approximation of mutuality (see remarks of Calvo as cited, Tome III, sec. 1304, p. 160, upon the interdiction of commerce by China and the barriers which she opposes to the expansion of civilization; memorandum of American Commissioners to negotiate treaty of 1880, Foreign Relations United States, 1881, pp. 171, 172); that if China treats "barbarians" in the spirit of ancient dynasties, the modern spirit, in the long run seeking to be fair and just, is not required to carry self-depreciation or abstract ideas to the point of Quixotic weakness, and in this matter of Chinese immigration and transit to impose no checks. Without complacently assuming that our checks are part of a providential compulsion, pointing out to China a better way, at least we may defend our own different standards and protect our national life from influences which the expression of the national will plainly declares to be dangerous; that is to say, it is evident, I think, in the broadest view of the inquiry, that we may take this course without offending against good morals or the most enlightened principles of international law.

Considering the opinion in the case of *Fong Yue Ting* v. *United States* (149 U. S., 698), and see *United States* v. *Lem Moon Sing* (158 U. S., 538) and *Chinese Exclusion Case* (130 U. S., 581, 609), there can be no doubt that this Government is firmly established on the doctrine that the power to exclude or expel aliens

is an essential attribute of sovereignty, which this nation possesses; that Congress is the sole judge of the wisdom, propriety, or necessity of the measures adopted; that even if the stipulations of a treaty should be disregarded in such measures, the treaty must yield to the later laws. If it is complained that there has been an infraction of treaty provisions, the remedy must be sought through international reclamation or negotiation; it is not a matter for judicial cognizance. (*Head Money Cases*, 112 U. S., 580; *Chew Heong* v. *United States*, id., 536, 562; *Whitney* v. *Robertson*, 124 U. S., 190; *Chinese Exclusion Case*, 130 U. S., 581, 600–603.) But here, we claim, the treaty explicitly authorizes the course pursued. It is clear that the privilege of transit accorded to aliens is subject to the same doctrines, and may be refused, or granted on terms, as we see fit to provide. Kent and Calvo show that this is no arbitrary rule of this nation, but the established law of nations. So that both solemn judgments of this court, and the declarations of that branch of law which sees international ethics unobscured by municipal laws, agree that the rules enacted by the United States on this subject are within our rights and competence as a sovereign nation.

The recent case of *Li Sing* v. *United States* (180 U. S., 486, 495), repeats the language used in the Fong Yue Ting decision, to the effect that the determination of the status of aliens within our jurisdiction is final with Congress, and that this court will not pass "upon the wisdom, policy, or justice of the measures

enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

To refer to Calvo again on two other points involved in this controversy: We contend that we are acting under and not contrary to the treaty in this case, and it requires no citation of authority to vindicate the high obligation of treaties, nor to show that Congress alone must determine when it is necessary to disregard the obligation. Calvo allows by inference that the repudiation of the obligations of a treaty may be demanded or justified under some circumstances, for he quotes from a message of President Arthur in vetoing a Chinese bill of the Forty-seventh Congress:

> A nation is justified in repudiating its treaty obligations only when they are in conflict with great paramount interests. Even then all possible reasonable means for modifying or changing those obligations by mutual agreement should be exhausted before resorting to the supreme right of refusal to comply with them. (Calvo, as cited, Tome III, sec. 1660, p. 399; see also message of President Arthur vetoing Senate bill No. 71, entitled "An act to execute certain treaty stipulations relating to Chinese," Cong. Rec., Forty-seventh Congress, first session, p. 2551.)

Referring to the most-favored-nation clauses of treaties, Calvo points out, especially in regard to ordinary treaties of commerce, that complete equality and absolute reciprocity under such clauses is very difficult to obtain, because of differences in the commercial, industrial, or social situation—"in manners and in the spirit

of economic legislation" (id., sec. 1597, pp. 365–6). This is not to say that such clauses are meaningless, but only that they are not definitely conclusive on construction.

Our diplomatic correspondence shows (2 Whart. Int. Law, pp. 456–477) that we acquiesce in the rigid surveillance of travel which is not yet much relaxed even among other western nations, and still less in China; and, accepting the serious burdens and embarrassments which result from foreign rules, exercise scrupulous care as to the issue of passports, and by refusing to support the claims of those who allege doubtful citizenship, or whose transit abroad is not *bona fide*, and is for such reasons obnoxious to a foreign government. Such transit is often interrupted by foreign refusals not only to admit to residence, but to grant the privilege of passage.

III.

THE PRACTICAL REASONS (IN GENERAL) FOR THE TREASURY RULES.

We do not seek to attach any unfavorable prepossessions to these records, but it will be proper to state the notorious experience of the Treasury Department in dealing with many such cases in order to explain the usual situation upon which such decisions are based.

The Chinese who transship at San Francisco for Mexican or Central American ports, or who pass by rail through the country on their way to West Indian ports or to a final destination in the interior of Mexico,

in many or most cases do not really know where they are going. They go in groups under a guidance or direction which disposes of them almost like animals. That is to say, notwithstanding alleged destinations and manifest lists, and even where they really go through to foreign territory, they are unshipped in batches at the first convenient port or station across the Mexican boundary. The border towns on the Mexican side are generally filled with large numbers of Chinese obviously waiting only for a favorable opportunity to enter this country. They do not seek work at these towns, and remain there idly in Chinese lodging houses and restaurants until a safe avenue of entrance to this country is opened. It is impossible to police effectively the entire stretch of that long frontier. The port of Ensenada in Lower California, about 40 miles below San Diego, was formerly a point where they disembarked in numbers, the border being conveniently near. Now Guaymas, inside the Gulf of California (with a direct railroad line to Nogales in Arizona), Mazatlan, and San Blas, farther down the Mexican coast, are the points where the sea transit often ends, whatever the asserted destination. While with Chihuahua, Saltillo, the City of Mexico, and other interior points as ostensible destinations, Chinese going by rail transit are unloaded at the first convenient station across the Mexican border, so that along the lines of travel, as at Eagle Pass, El Paso, and Nogales, there is a concentration, in the Mexican villages near the line, of Chinese awaiting an opportunity to enter this country. The Chinamen

themselves generally have no knowledge where they are going, and various unmistakable indications show that their only conception is that ultimately they will be landed in the United States by the various mysterious agencies who seem to guarantee this result.

This statement indicates the reason why the Treasury regulations provide for a strict scrutiny of identity, destination, and good faith to prevent the privilege of transit from being abused, as it undoubtedly is in many cases. I desire to repeat that I do not seek in any degree to impose such facts upon the records in these cases, but it seems proper to apprise the court in this statement, made only *arguendo*, of the usual situation and the general reasons for the Treasury rules and policy as reasonable and necessary.

IV.

THE PROVISION OF THE TREATY OF 1894; THE ACTS OF 1888 AND 1892; EXECUTIVE RULINGS.

Whatever the exact nature of the privilege of transit, or its origin here as applicable to Chinese laborers, the treaty of 1894 recognized it as continuing and as subject to such regulations by the Government of the United States as may be necessary; and this language can only mean such regulations as this Government finds necessary and accordingly imposes upon the conduct of the privilege. The regulations of December 8, 1900 (see appendix to Mr. Evarts's main brief), under which these men were refused the privilege, are more explicit and detailed than previous regulations, but are

not materially different. It is evident, as Judge Morrow points out in discussing the development of the regulations, that originally the privilege was recognized by regulations, without specific authority under the treaty then in force or existing laws. If the regulations were potent, without express authority, to permit Chinese laborers to pass through the country, notwithstanding the express provisions and the general policy of the exclusion enactments, then certainly, under a treaty which by necessary implication recognizes this origin of the privilege and its continuance under the previous regulations, and then expressly subjects the privilege to such regulations as may be necessary to prevent its being abused, there can be no valid doubt that this part of the law of the land authorizes the regulations which have been framed.

This is not a case of a treaty which is not operative without an act of Congress because it stipulates for the payment of money or because one of the powers engages to perform a particular act, which is addressed to the political and not the judicial department, and which the legislature must execute as a contract before it can become a rule for the courts. A treaty is the supreme law of the land, and is immediately operative where it deals with a subject finally and specifically, and the aid of Congress is not required to carry it into effect. (*Foster* v. *Neilson*, 2 Pet., 253; dissenting opinion of Justice Field, *Chow Hoong* v. *United States*, 112 U. S., 536, 562; 1 Whart. Int. Law, sec. 138; id., p. 73; opinion of Mr. Cush-

ing, 6 Op. Atty. Gen., 748.) A regulation made in pursuance of an act of Congress has the force of law (*Gratiot* v. *United States*, 4 How., 80; *United States* v. *Eliason*, 16 Pet., 291; *Ex parte Reed*, 100 U. S., 13; 22 Op. A. G., 568), and if made in pursuance of the provisions of a treaty should have equal force; for a treaty is the supreme law of the land and binds the courts as much as an act of Congress (authorities cited *ante*; *United States* v. *The Peggy*, 1 Cr., 103; *United States* v. *Rauscher*, 119 U. S., 407; *Whitney* v. *Robertson*, 124 U. S., 190; *Ex parte Cooper*, 143 U. S., 472).

Certainly it can not be said, under the language of the treaty of 1894, that an act of Congress could make clearer the right of the Government to impose regulations on this subject. Nor can it be said with any truth, when the purpose of the exclusion laws, the notorious shifts and evasions pursued, and the difficulty of meeting them are considered, that these regulations do not conform to the ordinary test of reasonableness. The authority of this Government to prescribe regulations, as granted or recognized in the treaty, is unqualified, and it can not justly be asserted that the Secretary of the Treasury has acted in an arbitrary manner or has adopted regulations which are unreasonable or absurd.

Further, section 8 of the act of September 13, 1888, gives the Secretary of the Treasury full authority to prescribe regulations, not only to protect Chinese persons provided for in certain articles of the treaty

with China then negotiated but never ratified, but also generally to "protect the United States against the coming *and transit* of persons not entitled to the benefit of the provisions of said articles." The classes protected seem to be Chinese persons of the permitted classes seeking to enter the country, and registered Chinese laborers seeking to return; and therefore "persons not entitled to the benefit of the articles" mean generally all other Chinese persons, and specifically, Chinese laborers seeking transit. That is to say, notwithstanding the failure of that treaty, here is a general authority to prescribe regulations respecting the classes of Chinamen who are not entitled to come to this country under existing laws and irrespective of the unratified treaty of 1888.

Now, it is true that there has been grave doubt as to what parts of the act of 1888 took effect, and whether *any* of its provisions are existing law. The lower Federal courts have generally held that the act became effective and is now law, excepting sections 1–4 and section 15 (see 2 Supp. R. S., 141, note). This court in the case of *Li Sing* v. *United States* (180 U. S., 486) decided that section 12 is not in force, although declining to say that there are no provisions in the act which from their nature are binding on the courts as existing statements of the legislative will. But the reason for this decision was that a different rule had been substituted by the later act of August 18, 1894 (id., p. 490). The Attorney-General has recently had occasion to advise the Secretary of the

Treasury that section 7 of the act of 1888 is not existing law, but mainly for the reason that its provisions have been substantially (but with slight variations) replaced by Article II of the treaty of 1894. (Opinion of October 10, 1901; see appendix to Mr. Evarts's main brief.) I submit that the authority given by section 8 to the Secretary of the Treasury to prescribe regulations on the subject of transit is one of the provisions of the act of 1888, which are most clearly not dependent upon the unratified treaty of that year, and therefore are to be regarded as valid existing law.

Section 5 of the act of 1888 seems to make it manifest that all the provisions of the act were not necessarily dependent upon the ratification of the treaty, for the language is, that after the passage of the act no Chinese laborer in the United States shall be permitted, after having left, to return thereto except under the conditions stated in the following sections.

Again, the act of May 5, 1892 (27 Stat., 25), which not only provided for the registration of resident Chinese laborers, but continued in force for ten years all the existing exclusion laws, provided in section 7 that "the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act." Although there was also explicit reference to the regulations covering the registration purpose of the act, the language quoted must be held to cover any purpose of the Chinese exclusion laws and to embrace the subject of the privilege of transit, which at that time was exercised solely under

regulations which the Treasury had prescribed, at first without express authority of law and later under the act of 1888.

Furthermore, the act of 1892, in its extension of existing laws, carried on all portions of the act of September 13, 1888, which were in force, including, as we contend, section 8 of the latter act authorizing regulations specifically upon transit, a matter which was conducted under previous regulations irrespective of any treaty, and, like the subject of section 5 of that act, was not dependent upon the unratified treaty.

It is an unwarrantable limitation of the act of 1892, considering its purpose, title, and general objects other than of registration, so to narrow the scope of the Secretary's authority in section 7 that his regulations may only cover the single feature of registering laborers.

Attorney-General Brewster, in an opinion dated July 18, 1882 (17 Op., 416), held that Chinese laborers desiring to return to their native land from other foreign lands may not be transported across the territory of the United States without a violation of the act of 1882.

> The enumeration in the statute of the cases in which Chinese laborers may be brought within the United States, notwithstanding the inhibition of the first section, must in my opinion be held to be exclusive of all other cases not enumerated. * * * This view of the statute is confirmed by the first article of the treaty with China, which gives the United States the

> right not only to regulate, suspend, or limit the residence of Chinese laborers in this country, but, furthermore, to regulate, suspend, or limit their coming here. As its title indicates, the act in question is pursuant to the treaty, and thus not obnoxious to the imputation of harshness or inhospitality toward a friendly power.

In a subsequent opinion, dated December 26, 1882 (id., 483), Mr. Brewster reversed that ruling, and held that the prohibition of the act of 1882 "applies to Chinese laborers coming into the country to stay as laborers;" that a Chinese laborer coming to this country merely to pass through it can not be considered as within the prohibition of the law; that therefore such Chinese persons are not required to produce the specified certificates of identification, provided they competently prove in some other manner their status as mere transient passengers. It is likely that on this change of view by Mr. Brewster the Treasury Department founded the early regulations permitting *bona fide* transits. (T. D., 5544.)

Mr. Garland (18 Op., 388) acquiesced in Mr. Brewster's later opinion, and, nevertheless, pointing out the ambiguity between the enacting clauses and the preamble of the act of 1882 as respectively determining Mr. Brewster's two opinions, indicated that it would be preferable for Congress affirmatively to clear up the ambiguity.

Mr. Brewster's later view was again approved in 19 Op., 369, while Mr. Olney (20 Op., 693) says: "In my judgment, and while there is room for difference of

opinion, Chinese laborers coming to this country merely en route to some other country may lawfully be permitted to pass through the United States."

So that this cautious executive allowance in favor of Chinamen, where a strict construction of existing laws would have deprived them of the privilege of transit, has ripened into an express recognition under the treaty, upon a broad and explicit recognition, however, of regulations to prevent the privilege from being abused.

V.

THE FINALITY OF THE EXECUTIVE DECISION.

It can make no difference whatever whether the portion of the land or waters of the United States through which the transit is to be made is great or small. In one case the Chinaman, in touching at San Francisco for transshipment, enters our coast and port waters and actually lands, though but temporarily in intention, and on passing out of our jurisdiction to reach his destination he would again pass through the port and coast waters of the United States, no matter how narrow the fringe of our territorial waters which he enters and leaves. In other words, this is as much a transit through the United States as in the case of the rail journey to the City of Mexico.

It seems to be one of the chief complaints on behalf of the Chinamen in these cases that the regulations provide that the applicants "shall be required * * * to satisfy the said collector that a bona fide transit only is intended." I can perceive nothing unreason-

able nor unwarranted in this, either in view of the essence of the business or as a delegation of power to the Secretary under the treaty to frame such a regulation, or by the Secretary to a subordinate. It makes final the decision of the administrative officer who is in possession of all the facts, and who has the applicant before him, and this is merely in accordance with the deliberate policy of this Government in reference to immigration and many other subjects, as illustrated by the act of August 18, 1894 (28 Stat., 390), which makes the decision of the appropriate executive officer final if adverse to an alien's admission, unless reversed on appeal to the Secretary of the Treasury. It is always true that while the Secretary is not required he is empowered not only to modify this regulation as he may see fit, but to supervise in any particular case or in all cases the action of his subordinate, either by providing for a formal appeal, or otherwise, as he may determine. It is probable that many valid, practical reasons have operated to lead him to omit to provide in the regulations for review by himself of such cases on appeal. The only remedy in this situation (if there is or should be one) is by application to the power and discretion of the Secretary to modify the regulation generally by providing for an appeal or to hear the case and supervise the collector's action in any particular instance.

It is, I think, beyond question that this matter is one either of transit or admission. It is not likely,

perhaps, that the court will think that the temporary coming of such an alien to this country to touch and pass out by vessel or to pass through by rail is admission within the meaning of the act of 1894, just cited; but if it is, the proper jurisdiction and the finality of the decision, subject to the plainly limited right of appeal, are too clear to require further argument. While if the cases are exclusively instances of transit, as distinct from admission, then we are dealing with a *privilege* and not a *right*. The privilege is subject to the unqualified power of regulation by this Government to prevent abuse. It is well known, and is almost matter of judicial knowledge, that there are endless current abuses and many cases where there is no *bona fides* whatever. Due regulations have been made, and by these regulations the decision of the designated executive officer is made final.

It is unnecessary to recall to the minds of the court its well-settled judgments that where the final determination of facts is intrusted to an executive officer, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence under which he acted. This subject was elaborately examined and the authorities fully reviewed in the case of *Lem Moon Sing* v. *United States* (158 U. S., 538). The court in that case stated the petitioner's contention, viz, that while the immigration officers have jurisdiction to exclude an alien who is not entitled to come

into the United States, yet if he is entitled of right to enter the country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction, and the courts may intervene; and the opinion then proceeds to hold that "this view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the Government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States."

So here the authority to deal with transit, committed to the Secretary of the Treasury and his subordinates, drawn from the treaty and from the regulations prescribed thereunder, is as clear as the authority to exclude from admission under the act of 1894, construed by the court in the Lem Moon Sing case; and we may say with equal force that the contrary view, if sustained, would bring into the courts every case of a Chinese laborer who claims the privilege of transit through the United States under some law or treaty, but is prevented from exercising it by the executive branch of the Government. This view would defeat the manifest purpose of the law contained in the treaty, for the purpose of that law to commit this subject to executive regulation and determination is more

broadly expressed, but is quite as clear as the similar purpose in the act of August 18, 1894.

VI.

AS TO OPPOSING COUNSEL'S BRIEFS.

When the United States by the treaty of 1894 recognized the privilege of transit, they were careful to guard against its abuse by stipulating for regulations. It is misleading and futile, I think, to contend that we are not concerned with transit after it is finished, and have no right to do more than regulate so that the privilege shall not be abused by escape en route while within the jurisdiction of this country. The privilege is abused if there is an intention to make the transit merely for the purpose of convenient clandestine reentry, and the right of the Government to inquire as to *bona fides* before transit commences can not be denied. A regulation which directs refusal of the privilege when on careful investigation it appears that the applicant is not acting in good faith is valid, and is comprehended by the language of the treaty. May the law be so construed that the United States is unable to protect itself from this notorious clandestine influx after transit has been performed? It seems to me absurd to say that the opportunity for this fraud may not be denied at our threshold, even where the illegal intention is apparent or where *bona fides* is not shown, and where the illegal result has happened in numberless such cases.

It must not be forgotten, in view of counsel's contention that the power to regulate the manner of

transit does not include the power to prohibit transit, that transit is not only a mere privilege the abuse of which occurs after the transit has been performed, and that in a very small percentage of the total applications is the privilege refused, and then only after careful investigation, but that the privilege is especially conferred, with the safeguard expressed, upon *Chinese laborers*, and the first article of this very treaty is an absolute recognition of the right of the United States to prohibit, with narrow exceptions, the coming of Chinese laborers. That is to say, it is impossible not to admit that the allowance of transit to Chinese laborers keeps steadily in view the abuse of transit by which Chinese laborers who are prohibited from entering the United States nevertheless enter clandestinely. If the effect of the regulations to prevent the abuse of transit is to prohibit the coming of Chinese laborers into the United States, that result is clearly warranted by the main purpose of this treaty as well as of all the exclusion laws. It did not require the authority of the treaty to provide regulations intended to prevent the escape of Chinese in transit while they are within the United States, because the remedy then would be by arrest and deportation under other laws; but the intention and effect of the treaty is so to arm the Treasury Department that it has the power to exercise extraordinary precautions against the abuse of the privilege and the courtesy of the Government by means other than escapes within our territory—by frauds perpetrated and clandestine entrances made solely because

of the opportunity which a completed transit not made in good faith permits.

I have endeavored to meet the contention of counsel that the regulations are not valid without authorization from Congress. The act of 1882 is entitled "An act to execute certain treaty stipulations relating to Chinese," because the treaty of 1880 obviously required legislation to protect ourselves against unauthorized immigration of Chinese as well as to protect the Chinese entitled to come. But I repeat that where a treaty expressly provides, as this treaty does, for regulations, it is as effective in its authorization as an act of Congress.

Counsel appears to make some gratuitous assumptions on the facts in his assertions that the regulations in transit cases are not executed in a reasonable manner, but arbitrarily.

In the first place I note, in reply to a contrary assertion, that Fok Young Yo's own application states his destination to be the town of San Jose de Guatemala in Mexico, and not the country of Guatemala.

As stated above, a very small percentage of these transit applicants are refused the privilege. Their cases are carefully investigated and reported in full to the collector of customs, who then decides in person, and it is not mere assertion, but the sober fact, that scrupulous care is given to the investigation, consideration, and decision of each case. The Chinese inspector who examines these Chinamen does not deny them, arbitrarily or at all, the privilege of transit, whether to

Mexico, or Central America, or any other foreign country; he merely reports the case, with the facts he has obtained (in an orderly way, without harsh or unreasonable measures, and without arbitrary adverse inferences), to the collector of customs, with his recommendation. He does not act upon suspicion, and the learned counsel has no right to put into the inspector's mouth, as he does on pages 21 and 22 of his main brief, words implying that the inspector himself disposes of all such cases in a summary and unfair way, with pretty uniform prepossessions against the Chinaman, and upon the persistent suspicion that any such applicant has a fraudulent intention. Where the inspector is convinced upon abundant and sufficient evidence that the applicant has been in the United States before and desires and intends to return thereto, although not entitled, or, if not having been in the United States before, is not entitled to admission, and is making his transit to a foreign country only for the purpose of admission to the United States, he recommends to the collector that the privilege of transit should be refused on the ground of bad faith and abuse of the privilege; and if the collector acts in accordance with this recommendation, it is because he is personally convinced upon the facts and evidence submitted that the recommendation is just and proper and the privilege should be refused.

Nor is there any justification for counsel's inference that an application for the privilege of transit to England would be granted without equally careful

investigation, or where an application with Mexico as the destination would be denied. Here again counsel attributes to the Chinese inspector language which is not justified by any facts appearing in this record or in any other place. I desire to enter the Government's express and earnest denial of the facts stated and implied on all these matters in the opposing arguments. This kind of argument is carried to its extreme when counsel descants upon the probabilities of the case, and undertakes to explain the deliberate and careful decisions of the Government officers in such cases "by the general hatred of the Chinese in San Francisco, which has warped and perverted the judgment of the subordinate officials of the Chinese bureau there stationed." I remark again that such assumptions are wholly unwarranted and gratuitous.

Nor is it true, as I am informed by the Treasury Department, nor is it anywhere presented in evidence, that the Chinese inspector at San Francisco breaks open the baggage of applicants and subjects them to the indignity of a search of the person. They are required to show their credentials and any evidence which they possess as to their true purpose and their real destination, but there is no forcible proceeding whatever in conducting such investigations.

Since such liberties are taken with the record by the other side, I have no hesitation in saying that in numerous cases of this nature—sometimes in transits such as these, or in roundabout transits first from points outside of our territory, as from Halifax to Cuba and

thence through the United States ostensibly back to Canada—the Chinamen admit, sometimes in ignorance and sometimes because the fact can not be concealed, that their only desire and intention is to get into the United States. Such admissions go so far as to state that the purchase of passage tickets includes a guaranty of admission to this country, from what agencies or guarantors does not appear. In many cases Chinamen who have obtained the privilege of transit as alien laborers going to a foreign country apply for a writ of *habeas corpus* en route and seek to remain in the country as native-born citizens. The device of return after a completed transit is merely another shift which the favorable opportunities have developed. So that it will, I think, be evident to the court, from this general array of well-known facts, that such cases by no means show that the United States, through its officers, are harshly and unjustly refusing the right of passage to innocent foreigners, in contravention of the established principles of the law of nations and of our own treaties and other laws.

VII.

ADDITIONAL CONSIDERATIONS.

I have cited *ante* the veto of President Arthur on a Chinese bill of the Forty-seventh Congress. It seems that there were few differences between that measure and the act of 1882 passed and approved a month later, the chief one being that the bill vetoed made the period of suspended immigration twenty years instead of ten. President Hayes had vetoed a more

radical bill, known as "the fifteen-passenger bill." These vetoes reflected two objections of those days to such legislation. In the first place, it was thought that we could not justly restrict Chinese immigration until we had modified the Burlingame treaty, and commissioners were finally appointed, and the treaty of 1880 was the result of their negotiations.

Mr. Justice Field, in his dissenting opinion in the case of *Chew Heong* v. *United States* (112 U. S., 569), says that while he had formerly been of the opinion that the treaty of 1868 prevented restriction, he had modified his views because of the want of reciprocity in the benefits stipulated. The learned justice, in this case and in the Chinese Exclusion case in 130 U. S., p. 601, states the proposition that the obligations of a treaty may be properly abrogated or disregarded when the agreements of the other power are ignored or broken and cites authorities and precedents therefor. "So of any other mutual stipulations. When on one side they are not observed or become incapable of enforcement they cease to become binding on the other." (112 U. S., 570.)

It may be remarked in this connection that in the proceedings in Congress in 1882, as well as from the title of the act of 1882, it is evident that Congress, both before the features of previous measures objectionable to President Arthur had been eliminated and afterwards in the debate on the bill passed, repelled the suggestion or charge that by such legislation we were repudiating our treaty obligations.

The second objection referred to above, current at the time of President Arthur's veto, was that under the treaty of 1880 we might merely *suspend*, not prohibit, Chinese immigration, and that only for a comparatively brief period. Now, notwithstanding all the steps taken toward prohibition (which have been sustained by this court), it might have been said with truth, and may be said with more reason since the ratification of the treaty of 1894, that at all times some Chinese persons could enter this country, and to-day returning laborers may enter: so that not only is the absolute prohibition of the original entry of laborers, now assented to by China, strictly limited in time (Article I, treaty of 1894), but we are still only limiting, suspending, and regulating, not prohibiting, the coming or residence of laborers.

The case is similar as to transit. One of the objections on behalf of China to the legislation of 1882 was that there was no provision for transit (clause 5, memorandum of Chinese minister quoted by Mr. Sherman in the Senate; Congressional Record, vol. 13, pt. 3, p. 2610); not only so, but the language of sections 8 and 9 of the act of 1882 (sec. 8 being slightly amended in the act of 1884) might well be regarded as preventing transit, for those sections apply to all vessels and to any Chinese passengers, and the prohibition is generally against landing, and there is no mention of coming into the United States for a permanent residence or "admission" for that purpose. It is very clear, I think, that the privilege of

transit, which was continued by the treaty of 1894, was a privilege conceded, under a very doubtful condition of the law, by the executive regulations, which always undertook to limit, suspend, and regulate. At all times the regulations have required a *bona fide* transit (see clause 2 of Secretary Folger's regulations of 1883, T. D., 5544); and while certain evidence, like the production of a through ticket, has been permitted to be received as competent proof, the regulations are careful not to say that any item of competent proof is sufficient proof, and have plainly from the very first committed the passing upon the evidence and the decision to the executive officers.

Now, it seems to me most unreasonable and untenable to contend that the privilege of transit must be granted in *every* case; that our regulation must be limited to scrutiny and guard while the Chinaman is within our own territory; that otherwise we prohibit the privilege. It seems to me that the necessary and natural force of the word "regulations" as used in the treaty, even if we construe it by the requirement of the treaty of 1880 as to immigration—as permitting limitation, suspension, and regulation, but not prohibition—undoubtedly permits us, in order to prevent abuse, to deny the privilege to a few fraudulent applicants among a large number of applicants. It is certainly an extreme contention to say that we prohibit and do not regulate the privilege unless we grant it in every individual case.

The concession of the privilege is general to the Chinese nation; it is not a guarantee to every individual Chinese laborer who comes here for transit.

Nor may it be said with any force that a treaty which explicitly gives the power to regulate, in full view of preexisting executive regulations, as the only express foundation of the privilege, requires an act to effectuate the power. The act of 1882 was required in order to execute the treaty of 1880, and was called an act to execute treaty stipulations because there were stipulations for self-protection and for the protection of Chinese demanding legislative enactment; but an act to regulate or to authorize regulations is very different from an act to execute a treaty, and is certainly not required where the treaty itself gives precisely the same authority, and as explicit authority, as an act would give.

I respectfully submit that the judgments of the courts below should be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

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Nos 478 & 482.

App'x to Br. of U. S.

Office Supreme Court U.S.
FILED
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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FOK YOUNG YO, APPELLANT,
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APPENDIX TO BRIEF FOR UNITED STATES, INCORPORATING CERTAIN STATISTICS AND FACTS FROM PUBLIC RECORDS.

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THE REGULATIONS ON THE SUBJECT CONSECUTIVELY STATED.

The regulations of May 19, 1882, Dept. No. 53, quoted the act just then passed and contained no separate specific provisions regarding transit.

The regulations of January 20, 1883, are shown in T. D. 5544, and are given in the appendix to Mr. Evarts's brief.

Secretary McCulloch's Chinese regulations of January 14, 1885 (T. D. 6722), given *in extenso* by Mr. Evarts, refer in the eighth paragraph alone to the matter of transit, show that merely touching here is transit, and subject that form of transit to the regulations of 1883.

Secretary Windom's regulations of 1889 (also quoted in Mr. Evarts's appendix) rescind previous regulations and were in force until the present regulations, dated December 8, 1900.

The form in which the regulations of 1889 were stated in the Treasury pamphlets ("Laws, treaty and regulations relating to the exclusion of Chinese") will be found on page 44 of the edition of 1899, and pages 45 and 46 of the edition of 1900. The present regulations of 1900 are also contained in Mr. Evarts's appendix.

It is only necessary to observe of this whole series of regulations that they all require a *bona fide* transit; that competent evidence may be received, and that the production of a through ticket is one item of competent proof and other evidence is contemplated. Certainly, in the investigation of this subject the Government may obtain and consider all other evidence, and is not restricted to that which the Chinaman may adduce in his own behalf.

RECORD OF TRANSIT APPLICATIONS AND REFUSALS.

Opposing counsel misconstrued the Government's statement about the number of transit applications and refusals. The statement was not that formerly there were many refusals and now there were fewer (upon

which counsel made a certain unfavorable inference), but just the reverse; namely, that formerly, when the abuse of transit was comparatively slight, substantially all the applications were granted, and that even now, when the evil has grown, and during the last record period of six months of the current year, there have been over 1,000 applications and less than 200 refusals. The Treasury Department records on this subject are thus summarized:

Between 1883 and 1901 there were 37,688 applications for transit granted and *none* were refused. These and the following figures refer to the port of San Francisco, where virtually all the transit cases come. It is known the privilege was abused in many cases included among this number. The evil grew and became apparent as the device most easily successful for Chinese laborers illegally seeking entrance to the United States. But even now, when under the evident abuse of the privilege the Government is scrutinizing and checking with the care required by the revised regulations, that is to say, during the last record period of six months of the year 1901, there have been 1,085 applications and 165 refusals. Nor is it accurate to say that there are just at present less refusals than there were a few months ago, because the Government is conscious of having gone too far; the case is quite the reverse. There are less refusals at the moment because the necessary lesson has been taught and the fraudulent applications have largely ceased. Surely the foregoing facts show regulation of the privilege to prevent abuse, and not prohibition.

THE QUESTION OF FINALITY, AND THE RECORD OF THE SECRETARY'S RECENT ACTION IN SUCH CASES.

It can not well be doubted that the present regulation commits the final decision on transit applications to the collector of customs; that is the intention and purpose as well as the result. There can be no question that such has been the practice, for the Secretary who framed the regulations so construes the matter and has so acted. The Government's understanding of the general principle is that there is no appeal in any such case as matter of right, unless the law expressly gives it. That is certainly the situation in respect to appeals in judicial proceedings; and so here or in any such case, where the law commits decision or action, evidently intended to be conclusive and final, to a designated executive authority, and does not expressly provide for the right of review or appeal, the decision of that authority is final.

We contend, of course, thoughout this case that the authority of the Secretary to frame the regulations is clear and ample. The Government does not deny the Secretary's *power* to provide for a review of the collector's decision by appeal to himself, nor his *power* to supervise in any less formal way the collector's action. But the Government does deny—and such is the Secretary's own view—that the Chinaman has the *right* of transit or the *right* to appeal. This leads to one of the questions put by the court as to what action the Secretary really took upon this point.

The Secretary, having before him the application on behalf of certain Chinese laborers for the privilege

of transit, including in effect the cases before the court (for Mr. Evarts says that they were recently brought before the Secretary), upon the 13th of November last referred to the Attorney-General for his opinion the question whether the right of appeal exists, making in his letter the following statement: "It has been held that neither the treaty nor the laws relating to the exclusion of Chinese, either expressly or by implication, give to Chinese persons refused the privilege of transit the *right of appeal*."

The Attorney-General, on November 15, declined to express an opinion upon the ground that the question was now before this court (in these very cases) for review, because "the point of the *right of appeal* to the Secretary of the Treasury is likely to be involved upon consideration of the proper jurisdiction in hearings before the Supreme Court."

Therefore it is evident that the Secretary has nowhere said that he was without *power* to review such cases, but has merely refused to recognize as a broad rule covering all cases the *right* of appeal which was claimed for Chinese laborers seeking transit. The Secretary therefore held to his previous view that no right of appeal existed, and that the regulations made the collector the final authority to determine in each case the question of permitting Chinese laborers to enjoy the privilege of transit.

As illustrating his own power to modify the regulations if deemed advisable and permit an appeal, or otherwise to supervise the action of his subordinate officer in any given case, I quote as follows from the

Secretary's letter of instructions to the collector of customs at San Francisco, dated November 18, 1901, in which the ruling that generally the collector of customs had final authority was announced:

> In looking over the appeals from your decisions recently transmitted, the Department is impressed with the apparent *bona fides* of the representations of certain of the appellants, particularly Nos. 44, 45, and 46, who claim to be destined to Panama; and, while it does not desire in any way to control your decision either as regards these or any other Chinese cases, yet it calls your attention to the fact that, as the last resort of Chinese seeking the privilege of transit, you should give such attention to cases of this character as will prevent any Chinese laborer who is honestly endeavoring to reach a final destination in foreign territory by passing through the United States, from being unjustly refused such privilege.

The issue here, however, is not upon the right of appeal in the case of "transits" *from the collector to the Secretary*, but *from the collector to the courts;* and it seems to the Government a singular contention, in enforcing the laws and the treaty for the exclusion of Chinese, that Chinese laborers claiming a mere *privilege* thereunder should have the right of recourse to the courts when that recourse is expressly denied by legislation to other persons who have certain *rights* under the same treaty and laws.

HENRY M. HOYT,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 478.—October Term, 1901.

Fok Young Yo, Appellant, vs. The United States. } Appeal from the District Court of the United States for the Northern District of California.

[May 5, 1902.]

This was a petition to the District Court of the United States for the Northern District of California for a writ of *habeas corpus*. The petition represented that the petitioner was a citizen of the Empire of China, and a resident of Guatemala in the Republic of Mexico, and was travelling to that place when interrupted in his journey as afterwards described; that on August 24, 1901, he purchased, for the sum of 183 Mexican dollars, from the agent of the Japanese steamship company of the Toyo Kisen Kaisha at Hong Kong in China, passage thence to San Jose de Guatemala in Mexico, and received from said agent a ticket for passage on the steamship Nippon Maru to the port of San Francisco, and an order upon the San Francisco agent of said company for a steerage ticket from San Francisco to San Jose de Guatemala; that upon arriving in the port of San Francisco he was, on September 19, 1901, examined by a customs inspector, his baggage and private papers opened, and his person searched; that, after the examination of the petitioner, the collector of customs at the port made an order of deportation, denying him the privilege of transit, and he was, by virtue of that order, detained by the agent of the steamship company in a frame building on the Pacific Mail dock at San Francisco, and, unless released by the court, would be deported and sent back to China; that the petitioner was not making application to enter the United States, or to pass in transit through the territory thereof, but was merely a passenger en route for a foreign port, and touching at the port of San Francisco while on his journey along the usual course of travel, and for the purpose of transshipping to another vessel; that the order under which he was held was illegal and void, and not authorized by any law of the United States, or by any treaty between the United States and the Empire of China; and that the collector of customs had no authority under the law to examine or to confine the petitioner.

The District Attorney, by leave of court, intervened in behalf of the United States, and suggested that the petitioner was a native of the Empire of China, and a laborer by occupation, and before the filing of his petition arrived at San Francisco from Hong Kong in transit, through the territory

of the United States, for the Republic of Mexico; that the collector of customs for the port of San Francisco, after careful and due investigation, had decided that he was satisfied that the petitioner did not intend in good faith to continue his voyage through the territory of the United States to the Republic of Mexico, and had for that reason denied him the privilege further to continue his journey through the territory of the United States, and had ordered him deported to China; and that the court had no jurisdiction over the person of the petitioner, or over the subject matter of this proceeding.

The parties submitted the case to the decision of the court upon the following facts: "The petitioner is a subject of the Empire of China. He arrived at the port of San Francisco on the Japanese steamship Nippon Maru, the manifest of which vessel states that he intended to go to San Jose de Guatemala. Petitioner herein also alleges that that was his intended destination. The collector of customs at the port of San Francisco did, on September 23, 1901, deny the petitioner the privilege of further pursuing his journey to his alleged point of destination. The petitioner has a ticket, or an order for a ticket, for a through passage from Hong Kong, China, to San Jose de Guatemala by steamer. The petitioner is now held by W. H. Avery, agent for the Japanese steamship company, by virtue of an order issued by the collector of customs for the port of San Francisco, directing him to retain the person of the petitioner in his custody, and deport him to China."

The court ordered the petition and the writ of *habeas corpus* to be dismissed, and the petitioner remanded to custody; and he appealed to this court.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The facts upon which the parties submitted the case to the decision of the court below do not include, on the one hand, the statement of the petition that the petitioner was examined by a customs inspector, his baggage and papers opened, and his person searched; nor, on the other hand, the statements in the intervention of the United States, that the petitioner was a laborer by occupation, and that the decision of the collector for his detention and deportation was made after due and careful investigation, and for the reason that he was satisfied that the petitioner did not intend in good faith to continue his voyage through the territory of the United States to the Republic of Mexico. But the facts agreed are simply that the petitioner was a subject of the Empire of China, arriving at the port of San Francisco, whose intended destination, as appeared by the manifest of the vessel in which he arrived, and by his own allegation, was San Jose de Guatemala in the Republic of Mexico, and who had a ticket, or an

order for a ticket, for a through passage from Hong Kong, China, to San Jose de Guatemala by steamer; and that the collector of customs at San Francisco denied him the privilege of further pursuing his journey to his alleged point of destination, and issued an order directing him to be detained and deported to China.

The whole question in the case, therefore, is whether this denial and order of the collector were authorized by law.

Before the treaty of 1894 between the United States and China, the privilege of transit of Chinese persons across the territory of the United States was not specifically mentioned in any treaty or statute, except in the last clause of section 8 of the act of September 13, 1888, c. 1015, by which the Secretary of the Treasury was authorized to make, and from time to time to change, "such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of" a treaty between the United States and China, signed March 12, 1888, but not then ratified, "the rights therein mentioned and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles." 25 Stat. 478. As that treaty was never ratified, it may be doubtful whether that section ever took effect. See *Li Sing* v. *United States*, 180 U. S. 486, 490; *United States* v. *Gee Lee*, 50 Fed. Rep. 271.

But such privilege of transit was recognized by successive Attorneys General from 1882 to January, 1894; (17 Opinions, 416, 485; 18 Opinions, 388; 19 Opinions, 369; 20 Opinions, 693;) and it was regulated by orders of the Treasury Department.

By regulations of Secretary Folger of January 23, 1883, it was provided that "where a Chinese consul resides at the port of landing or entrance into the United States by any Chinese laborer claiming to be merely in transit through the territory of the United States in the course of a journey to or from other countries, the certificate of such Chinese consul, identifying the bearer by name, height, age, &c., so far as practicable, and showing the place and date of his arrival, the place at which he is to leave the United States, the date when his journey is to begin, and that it is to be continuous and direct, shall be accepted as *prima facie* evidence;" that, "in the absence of such certificate, other competent evidence to show the identity of the person, and the fact that a *bona fide* transit only is intended, may be received;" and that "the production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the collector and verified by him. Such tickets and all other evidence presented must be so stamped or marked and dated by the customs officer as to prevent their use a second time."

By regulations of Secretary McCulloch of January 14, 1885, the regulations of January 23, 1883, "relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States;" and "Chinese persons who may be compelled to touch at the ports of the United States in transit to foreign countries may be permitted to land under the regulations of January 23, 1883, so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination, or the voyage of which may form part of the route necessary to carry them to their destination."

By regulations of Secretary Windom of September 28, 1889, "any Chinese laborer claiming to be in transit through the territory of the United States, in the course of a journey from and to other countries, shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States intended to be traversed, and such other proof as he may be able to adduce, to satisfy the collector of the fact that a *bona fide* transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the customs officer as to prevent their use the second time;" a bond in the penal sum of $200 was required for each Chinese laborer, "conditioned for his transit and actual departure from the United States within a reasonable time, not exceeding twenty days from the date of arrival;" and previous regulations on the subject were rescinded.

By article 3 of the treaty between the United States and China of March 17, 1894, it is "agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused." 28 Stat. 1211. That article was also in the unratified treaty of 1888.

On December 8, 1900, Secretary Gage issued regulations amendatory of the regulations of September 28, 1889, and addressed "to collectors of customs and all other officers charged with the enforcement of the Chinese exclusion laws," the material parts of which were as follows:

"Complaints having reached the Department of attempted violations of the laws enacted for the exclusion of Chinese by those who have been allowed to pass through the United States to foreign territory, the following rules are hereby adopted for your guidance in granting permission for such transit:

"Any Chinese person arriving at your port, claiming to be destined to some foreign country, and seeking permission to pass through the United States, or any portion thereof, to reach such alleged foreign destination,

shall be granted permission for such transit only upon complying with the following conditions:

"1. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a *bona fide* transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States.

"2. The applicant in each case, or some responsible person on his (or her) behalf, or the transportation company whose through ticket he (or she) holds, shall furnish to the said collector of customs a bond in a penal sum of not less than $500, conditioned for applicant's continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port."

These regulations repeat the requirements of those of 1889, (which took the place of previous regulations), that evidence must be produced to satisfy the collector "that a *bona fide* transit only is intended." Clearly in the absence of provision for review his decision is final.

The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the Government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lee Moon Sing* v. *United States*, 158 U. S. 538; *Li Sing* v. *United States*, 180 U. S. 486.

And as a general proposition this must be true of the privilege of transit. The underlying principle is thus stated by Kent, (vol. 1, p. 35): "Every Nation is bound, in time of peace, to grant a passage, for lawful purposes, over their lands, rivers, and seas, to the people of other States, whenever it can be permitted without inconvenience; and burthensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners, or their merchandise, injurious to those interests of their own people which they are bound to protect and promote, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it."

In short, the privilege of transit, although it is one that should not be withheld without good cause, is nevertheless conceded only on such terms as the particular Government prescribes in view of the well being of its own people. If then these regulations have the force of law, they bind the courts.

The first article of the treaty of December 8, 1894, provides that "the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited." The second paragraph of article three reads: "It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

We regard this as explicitly recognizing existing regulations, and as assenting to their continuance, and to such modification of them as might be found necessary to prevent abuse. It dealt with the subject specifically, and was operative without an act of Congress to carry it into effect.

The treaty of 1880, (22 Stat. 826,) in declaring in respect of the coming of Chinese laborers into this country that the government of the United States might "regulate, limit or suspend such coming or residence," did not refer to the privilege of transit, and, as it was not self-executing, the act of May 6, 1882, was passed to carry the stipulation into effect. But the provision of this treaty applicable here, in recognizing the privilege of transit and providing that it should continue, proceeded on the ground of its existence and continuance under governmental regulations, and no act of Congress was required. *Lee Gon Yung* v. *United States*, 111 Fed. Rep. 998.

Nor is the provision open to the ingenious construction suggested, that it is only after transit has commenced that the privilege may be abused. The abuse of the privilege might consist in the use of passage across the country to reach a point from which to effect an entrance into it, contrary to law. The journey contemplated would in effect be continuous, and the intermediate destination could not absolve from the guilt involved in the effort to attain that forbidden ulterior destination. Such an abuse of the privilege could only be prevented by arresting the journey on the threshold.

Necessarily the collector's decision could not be controlled by the bare production of a through ticket to a point in foreign territory. The very question to be determined is good faith in the transit, and good faith would be lacking if that transit were merely a means of effecting admission into the United States. And the decision of the Treasury Department as to the right of admission is made final by statute.

For instance, it is difficult, if not impossible, to police effectively the long frontier between the United States and Mexico, and if, in a given

case, a Chinese laborer arrives at San Francisco ostensibly bound to a port in Mexico, but going there for the purpose of crossing thence into this country, this would be an abuse of the privilege, and denial of transit would be justified. And this, in cases where such is the intent and purpose, is in accordance with the terms of the treaty, and not in the exercise of a general power to prohibit that which the treaty permits.

By the act of August 18, 1894, (28 Stat. 390,) the decision of the proper executive officer, if adverse to an alien's admission, was made final unless reversed on appeal to the Secretary of the Treasury.

That act came under consideration in *Lee Moon Sing* v. *United States*, 158 U. S. 538. Petitioner contended that while the immigration officers had authority to exclude aliens from coming into the United States, yet if an alien was entitled of right to enter the country, and was nevertheless excluded by such officers, the latter exceeded their jurisdiction, and the courts might intervene; but Mr. Justice Harlan, speaking for the court, said: "That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value."

So in the case before us, the treaty manifestly operated to commit the subject of transit to executive regulation and determination; and by the then, as well as the present, regulations, the final decision as to permitting transit was devolved on the collector of customs, and no appeal to the Secretary was provided for. It appears from the official documents referred to on the argument that the Treasury Department has "held that neither the treaty nor the laws relating to the exclusion of Chinese, either expressly or by implication, give to Chinese persons refused the privilege of transit the right of appeal;" but possession of the power to grant an appeal, or to supervise the action of the collector in some other appropriate way, in circumstances demanding intervention, has not been disavowed.

This case is an attempt to transfer the inquiry from the collector to the courts. Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country. The regulations to prevent abuse of the privilege of transit have

been and are intended to effectuate the same policy, and recourse to the courts by *habeas corpus* to determine the existence of such abuse appears to us equally inadmissible.

The record does not present a case of regulation or action in contravention of the Constitution, and we think that, upon the admitted facts, the orders of the collector cannot be held to have been invalid.

Order affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.